INITIAL DECISION RELEASE NO. 380
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13099

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
NEWBRIDGE SECURITIES CORP.,	:	INITIAL DECISION
GUY S. AMICO,	:	June 9, 2009
SCOTT H. GOLDSTEIN,	:	
ERIC M. VALLEJO, and	:	
DANIEL M. KANTROWITZ	:	

APPEARANCES: C. Ian Anderson and Robert K. Levenson for the Division of Enforcement, Securities and Exchange Commission.

Stavroula E. Lambrakopoulos and Stephen G. Topetzes for Guy S. Amico and Scott H. Goldstein.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) on July 25, 2008, pursuant to Section 8A of the Securities Act of 1933 (Securities Act) and Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act).

In relevant part, the OIP focuses on the conduct of Daniel M. Kantrowitz (Kantrowitz), formerly a registered representative at Newbridge Securities Corporation (Newbridge), an introducing broker and dealer located in Ft. Lauderdale, Florida. The OIP alleges that Kantrowitz participated in an unregistered distribution of the stock of Roanoke Technology Corporation (Roanoke) and manipulated the market for Roanoke shares in November and December 2003. The OIP also charges that Kantrowitz manipulated the market for the shares of Concorde America, Inc. (Concorde), between June and October 2004. Finally, the OIP contends that Guy S. Amico (Amico) and Scott H. Goldstein (Goldstein), Newbridge's president and chief executive officer, respectively, failed reasonably to supervise Kantrowitz in connection with his activities in Roanoke and Concorde.

The OIP charges that Kantrowitz willfully violated Sections 5(a), 5(c), and 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5 (OIP ¶¶ I.57-58). It further alleges that Amico and Goldstein failed reasonably to supervise Kantrowitz, within the meaning of Sections 15(b)(4)(E) and 15(b)(6) of the Exchange Act, with a view to detecting and preventing his violations of the registration and antifraud provisions of the federal securities laws (OIP ¶ I.59). As relief, the Division of Enforcement (Division) seeks $120,000 civil penalties against Amico and Goldstein. It also seeks to bar them from supervising a broker or dealer, with a right to reapply after five years.

Three of the five Respondents settled with the Commission. I held an eleven-day public hearing in Miami, Florida, and Washington, D.C., as to Amico and Goldstein in December 2008 and January 2009.[1] The Division and the two actively-defending Respondents then filed proposed findings of fact, proposed conclusions of law, and briefs, and the matter is now ready for decision. I base my findings and conclusions on the entire record and on the demeanor of the witnesses who testified at the hearing. I applied "preponderance of the evidence" as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). I have considered and rejected all arguments, proposed findings, and proposed conclusions that are inconsistent with this decision.

FINDINGS OF FACT

I. RESPONDENTS

Kantrowitz, a resident of Boca Raton, Florida, was a registered representative at Newbridge from September 2001 to June 2008, when he resigned (Tr. 13, 25, 47-48, 1293-94). He is a high school graduate and has taken a few college courses (Tr. 13). Kantrowitz has extensive experience as a market maker and, during 2003 and 2004, he specialized in making markets in penny stocks (Tr. 15-16, 19-20, 49-50). At the relevant times, Kantrowitz held Series 55 and 62 licenses and was one of Newbridge's top revenue producers (Tr. 30, 46, 55-56, 1001-02, 1137, 1961). Kantrowitz functioned as both a registered representative and a trader. His customers were primarily penny stock consultants and promoters who acquired stock certificates directly from issuers and wanted to liquidate the certificates in the open market (Tr. 24, 50-51, 1001, 1996). Kantrowitz gathered new customers by word-of-mouth referrals from satisfied current customers (Tr. 23, 52-53). As a trader, Kantrowitz executed only unsolicited transactions and submitted only unsolicited quotes throughout his career (Tr. 22-23, 51, 408, 778-79). At the time of the hearing, Kantrowitz was unemployed (Tr. 48).

Eric M. Vallejo (Vallejo), age forty-five, resides in Plantation, Florida (Tr. 1698). He served as Newbridge's head trader from early in 2001 through the date of the hearing (Tr. 916-17, 1698; DX 109 at 2). At the relevant times, Vallejo directly supervised Kantrowitz (Answer ¶ C.13). He also supervised Newbridge's trading and market making activities, traded

[1] The joint answer of Respondents Amico and Goldstein, dated September 9, 2008, will be cited as "Answer ¶ ___." The hearing transcript, as corrected by my Order of January 30, 2009, will be cited as "Tr. ___." The Division's exhibits and Respondents' exhibits will be cited as "DX ___" and "RX ___," respectively.

Newbridge's proprietary account, and traded for his own account (Tr. 1701; DX 109 at 2, DX 149). Vallejo has held Series 7, 24, 55, and 63 licenses, but no longer holds the Series 63 license (Tr. 1700, 1842-43).

Amico, age forty-five, resides in Wellington, Florida (Answer ¶ A.2). He owns 27% of Newbridge and serves as the firm's president (Tr. 836; DX 109 at 3). Amico is a high school graduate and has taken some college courses (Tr. 840-41; DX 109). He holds Series 7, 24, and 63 licenses (Tr. 841-42; DX 109).

Goldstein, age forty-three, resides in Delray Beach, Florida (Tr. 1333-34). He owns 27% of Newbridge and serves as the firm's chief executive officer (Tr. 1333-34, 1336; DX 109 at 3). Goldstein earned a B.S. degree from the State University of New York at Old Westbury (Tr. 1335; DX 109). He holds Series 7, 24, and 63 licenses (DX 109). Amico and Goldstein delegated the day-to-day supervision of Kantrowitz to subordinates (Answer ¶ G.13)

Amico and Goldstein acquired Newbridge in August 2000 (Tr. 1180-81, 1335). The firm grew from approximately fifteen registered representatives in 2000 to approximately 250 in 2003, approximately 300 in 2004, and approximately 400 or 450 at the time of the hearing (Tr. 1130, 1338-39, 1541). Newbridge operates several branch offices, but all of the events at issue in this proceeding occurred at the firm's Ft. Lauderdale headquarters. Kantrowitz, Vallejo, Amico, and Goldstein each worked in Ft. Lauderdale.

Newbridge initially cleared its trades through Sterne, Agee & Leach, Inc. (Sterne Agee). It began to clear through Wexford Clearing Corporation (Wexford) in August 2002, and then through National Financial Services (NFS) in August 2004 (Tr. 1176-80; DX 111 at 4). By October 2004, it had returned to clearing through Sterne Agee (DX 94 at 450, 455).

II. KANTROWITZ'S UNDERLYING CONDUCT

A. Roanoke

1. Unregistered Distribution of Roanoke Stock through the Abuse of Form S-8

Roanoke was a Florida corporation, with its principal office in Rocky Mount, North Carolina. The company was formed in 1997 and administratively dissolved by the State of Florida in 2008. Roanoke assisted other companies in enhancing their internet web site presence by improving a site's search engine result rankings. David L. Smith (D. Smith) served as Roanoke's chief executive officer and president (Tr. 504).

Roanoke's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act. At the times relevant to the OIP, the stock was quoted on the Over-the-Counter Bulletin Board (OTCBB or Bulletin Board).[2] Roanoke's stock was "penny stock"

[2] The OTCBB is an electronic inter-dealer quotation system that displays real-time quotes, last-sale prices, and volume information for many over-the-counter securities that are not listed on a national securities exchange. Under the OTCBB's eligibility rules, companies that want to have

within the meaning of Section 3(a)(51)(A)(iv) of the Exchange Act and Exchange Act Rule 3a51-1.

Thomas Bojadzijev (Bojadzijev), age thirty, resides in Orlando, Florida (Tr. 453). Between 1999 and 2006, Bojadzijev earned his living as a self-employed consultant to several public companies that paid him in penny stock (Tr. 455, 458-60). Bojadzijev would then sell the penny stock shares through brokerage firms in the open market (Tr. 455). Bojadzijev used nine to twelve different brokerage firms during this interval, but he preferred to liquidate his stock certificates through brokers who made markets in these stocks (Tr. 456-57).

Background: The Commission Permits Wider Availability of Form S-8 and Then Prosecutes Abuses of the Form.

In 1953, the Commission adopted a simplified form (Form S-8) for the registration of securities offered pursuant to employee stock purchase plans. Adoption of Form S-8, 18 Fed. Reg. 3688 (June 16, 1953). Form S-8 provides for an abbreviated disclosure format because offerings are made to a registrant's employees primarily for compensatory and incentive purposes, rather than to the public to raise capital to finance a registrant's business.

In 1990, the Commission broadened the availability of Form S-8. As here relevant, it made the Form available for securities issued to compensate consultants and advisors who render bona fide services to an issuer, provided that such services are not rendered in connection with the offer or sale of securities in a capital-raising transaction. Registration and Reporting Requirements for Employee Benefit Plans, 55 Fed. Reg. 23,909 (June 13, 1990). The Commission reasoned that, where securities were issued for compensatory rather than capital-raising purposes, there was no meaningful basis for distinguishing between transactions with regular employees and those with consultants and advisors retained by the registrant.

Over the next several years, the Commission took enforcement action against issuers, promoters, brokerage firms, registered representatives, and others who were misusing Form S-8 to distribute securities to the general public without the protections of registration under Section 5 of the Securities Act. See, e.g., SEC v. Softpoint, Inc., 958 F. Supp. 846, 854, 859-65 (S.D.N.Y. 1997), aff'd, 159 F.3d 1348 (2d Cir. 1998); Sky Scientific, Inc., 69 SEC Docket 945 (Mar. 5, 1999) (Initial Decision), aff'd sub nom., Daniel R. Lehl, 55 S.E.C. 843 (2002).

In 1999, the Commission also adopted amendments designed to restrict the availability of streamlined registration on Form S-8. To deter abuses of the Form, the Commission revised the

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their securities quoted on the OTCBB must file current financial reports with the Commission or with their banking or insurance regulators.

On March 21, 2006, the OTCBB delisted Roanoke's stock because Roanoke was delinquent in its periodic filings. The Commission later revoked the registration of all classes of Roanoke's registered securities for the same reason. Roanoke Tech. Corp., 92 SEC Docket 1342 (Jan. 15, 2008) (default), recons. denied, 92 SEC Docket 3440 (Mar. 14, 2008).

instructions to Form S-8. Under these amendments, consultants and advisors are treated like employees only if the consultants and advisors provide bona fide services to the registrant, and the services provided are not in connection with the offer or sale of securities in a capital-raising transaction, and the services provided do not directly or indirectly promote or maintain a market for the registrant's securities. Registration of Securities on Form S-8, 64 Fed. Reg. 11,103 (Mar. 8, 1999). The Commission also provided interpretive guidance that Form S-8 is not available to register offers and sales of securities either to traditional employees or to consultants and advisors where, by prearrangement or otherwise, the issuer or a promoter controls or directs the resale of the securities in the public market, or the issuer or its affiliates directly or indirectly receive a percentage of the proceeds from such resales. Id. at 11,106; see SEC v. Phan, 500 F.3d 895, 903 (9th Cir. 2007).

November-December 2003: Roanoke
Issues S-8 Stock to Bojadzijev, Who Promptly Resells
It to the Public through Newbridge and Kantrowitz.

Bojadzijev opened two accounts at Newbridge in September 2002 (Tr. 113-14, 461; DX 40-DX 42).[3] A fellow consultant who maintained an account at Newbridge told Bojadzijev that Kantrowitz "could unload a lot of stock . . . quickly" (Tr. 462, 548). In their initial conversations, Bojadzijev informed Kantrowitz and his trading desk assistants that he received "a lot of stock" and was "looking to liquidate it in a quick fashion" (Tr. 464, 467, 549).

Kantrowitz sold several penny stocks for Bojadzijev during 2002 and 2003 (Tr. 111-12, 169-70, 466, 474-75). Bojadzijev was impressed that Kantrowitz could sell a large volume of shares without depressing the price per share (Tr. 473). At times, Bojadzijev would request that Newbridge wire the proceeds from such sales to him before the transactions had been settled by the clearing broker and before the proceeds had been posted to his Newbridge account (Tr. 144, 174-75). Kantrowitz supported these requests, and Newbridge authorized the wires (Tr. 174-79, 181; DX 65, DX 131). Kantrowitz did not question Bojadzijev about his consulting work or the stock certificates he brought to Newbridge (Tr. 114-15, 469-70, 475).

On November 21, 2003, Roanoke filed a Form S-8 with the Commission, which described a transfer of 300 million shares of Roanoke common stock, valued at $0.005 per share, to Bojadzijev in exchange for consulting services to Roanoke (official notice).[4] The consulting

[3] Bojadzijev maintained both a personal account and a corporate account at Newbridge, but all of the relevant transactions occurred in his personal account (DX 40-DX 42, DX 46, DX 49 at 19-22).

[4] OIP ¶ E.25 alleges that these 300 million shares totaled "nearly half of Roanoke's outstanding shares." The Division presented no evidence to support that claim (Tr. 834). In any event, Bojadzijev deposited 250 million shares at Newbridge, not 300 million shares (DX 43).

agreement between Bojadzijev and Roanoke, and an opinion letter from counsel, were attached (official notice). The Form S-8 and its attachments were publicly available on filing.[5]

According to the consulting agreement, Bojadzijev would provide Roanoke with services including those concerning "management, marketing, consulting, strategic planning, corporate organization and structure" (official notice). Bojadzijev received his 300 million shares in block increments of 50 million shares each (DX 44).

Beginning in November 2002, Newbridge procedures required that, before a sale of any stock which had been presented in certificate form could take place, the registered representative needed to complete a stock certificate deposit questionnaire and provide it to the compliance department (DX 97). On November 5, 2003, Newbridge tightened its policy and required the registered representative to complete the questionnaire "immediately," i.e., the same day he or she received the certificate (Tr. 74, 2000; DX 98, DX 99). Newbridge policy did not permit any exception to this requirement (DX 97, DX 99).

The questionnaire was designed to ensure that there were no restrictions on the stock, to gather information that would assist the compliance department in making sure that the registered representative was not violating any rules by liquidating the stock, and to limit the financial and regulatory risk to Newbridge (Tr. 2238-39). If the shares were sold before this information could be obtained, the questionnaire would have no value (Tr. 1501, 2239).

Between November 24 and December 22, 2003, Bojadzijev deposited with Newbridge five Roanoke certificates representing 50 million shares each, a total of 250 million shares (DX 43). Newbridge received these certificates on November 24, 2003, and on December 4, 11, 16, and 22, 2003, respectively (DX 43). Trading desk employees prepared stock deposit questionnaires for these certificates, but Kantrowitz did not sign, date, and submit the questionnaires until after he had sold the shares (Tr. 125-27, 130-31; DX 43, DX 46). The first two questionnaires, which Kantrowitz signed on December 9, 2003, reflect that Roanoke issued the stock to Bojadzijev in connection with "a private transaction" (Tr. 125; DX 43). These two questionnaires also stated that the shares were not registered through a Form S-8 filing with the Commission (Tr. 125; DX 43). The last three questionnaires, which Kantrowitz signed on

[5] Pursuant to Securities Act Rule 462(a), 17 C.F.R. § 230.462(a), the Commission deemed Roanoke's Form S-8 effective on its filing date. The Form S-8 only registered Roanoke's issuance of shares to Bojadzijev. It did not register the resale of those 300 million shares by Bojadzijev to the public.

The resale transactions were either registered, exempt from registration, or illegal. To register the resale, Roanoke would have had to file a separate reoffer prospectus or a post-effective amendment to its Form S-8. In the alternative, Roanoke might have registered the reoffer or resale of such shares by means of a separate registration statement. I take official notice of the fact that Roanoke did not make any such filings with the Commission (Order of April 13, 2009). For the resale transactions to be exempt from registration, Bojadzijev had to be a person other than an issuer, an underwriter, or a dealer. See infra pp. 49-54.

December 30, 2003, reflect that Roanoke issued the stock to Bojadzijev pursuant to a Form S-8 registration as compensation for consulting services (Tr. 129-30; DX 43). All five questionnaires noted that the certificates did not bear any restrictive legends and that Bojadzijev's objective was to sell the shares (DX 43).[6]

Bojadzijev denied representing to Newbridge that he had acquired his Roanoke shares in a private transaction (Tr. 479-82). Kantrowitz asserted that another trading desk employee had entered the words "private transaction" on the first two questionnaires and that he had merely signed the form as presented to him by that employee, without further inquiry (Tr. 125-26). No later than December 9, 2003, Bojadzijev told Kantrowitz the shares had been issued under Form S-8 (Tr. 479-82). However, on December 29, 2003, Bojadzijev told Kantrowitz the shares were not for consulting services, but rather, were "SB-2 shares" (DX 65, Dec. 29, 2003, at 11:24:49). A few moments later, he told Kantrowitz "I loan [Roanoke] money" (DX 65, Dec. 29, 2003, 11:25:34). There is no evidence that Kantrowitz inquired further about the origin of the Roanoke shares.[7]

On November 28, 2003, four days after Kantrowitz started liquidating the first Roanoke certificate, Bojadzijev sent Kantrowitz a facsimile copy of a letter addressed to him from D. Smith (Tr. 133-36, 138, 502-03; DX 44, DX 65). The letter, dated two days earlier, stated: "As we discussed, the 300 million shares registered on 11-21-2003 will not be cancelled under any circumstances. They will be issued to you in lots of 50 million, which keeps you under the 10% rule" (DX 44). Another Kantrowitz customer selling a large block of penny stock had sent Newbridge a similar letter several months earlier (DX 134) ("the issuer has sent us a letter stating that these shares will not be stopped, etc."). I credit Bojadzijev's testimony that Kantrowitz told him what the letter should say about the possibility of cancellation (Tr. 502-05). I reject Kantrowitz's testimony to the contrary (Tr. 137).

Between November 24 and December 29, 2003, Kantrowitz sold 233,710,498 shares of Roanoke for Bojadzijev on the open market, in sixty-one transactions (DX 46, DX 48, DX 49 at 19-22). Bojadzijev repeatedly asked Kantrowitz for advance release of the proceeds from these sales, before the proceeds had been settled into his Newbridge account (DX 65). Kantrowitz facilitated these requests (Tr. 174-79, 181; DX 65). Between November 28 and December 15, 2003, Newbridge approved at least five wire transfers, totaling $251,909.69 (DX 131).

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[6] Counsel and the witnesses often used the terms "free trading" or "freely tradable" to describe stock certificates without restrictive legends (Tr. 60, 75, 635, 647, 817-18, 821-23, 831, 2404.) The absence of restrictive legends on the five Roanoke stock certificates did not mean that the shares could lawfully be sold to the public. The presence of a restrictive legend on a certificate would have precluded its transfer. The absence of a restrictive legend merely made transfer of the shares possible, not lawful.

[7] Newbridge eventually obtained a copy of the consulting agreement between Bojadzijev and Roanoke, but it is unclear as to when this occurred (Tr. 2041).

Kantrowitz knew that Bojadzijev was wiring some of these proceeds back to Roanoke, but he did not ask why Bojadzijev was doing so (Tr. 146-48, 512-14; DX 65, Nov. 28, 2003, at 10:01:42). In fact, Bojadzijev was kicking back some of the proceeds to D. Smith. Once D. Smith received his share of the proceeds, he would cause Roanoke to issue another 50 million share certificate of S-8 stock to Bojadzijev (Tr. 512).

2. Manipulation of Roanoke Stock

The Division alleges that, in order to liquidate his S-8 shares into the market, Bojadzijev instructed Kantrowitz to "artificially buoy" the stock price (OIP ¶ F.31).[8] The relevant evidence consists principally of testimony, exhibits with instant message traffic between Kantrowitz and others, and an exhibit reflecting some of the executed transactions and some of the bids and asks posted by Newbridge and other market makers on behalf of their customers.[9] There are no order tickets (paper or electronic) and no daily trading volume figures for the market as a whole or for Newbridge alone. The exhibit with bid and ask quotes does not show the volume (number of shares) associated with the bids and asks.

As noted, Bojadzijev sold approximately 233 million shares of Roanoke in sixty-one transactions between November 24 and December 29, 2003. Newbridge also posted two purchases of Roanoke, totaling 620,000 shares, to Bojadzijev's account during the same period (DX 46, trades ## 34 and 41, DX 48, DX 49 at 21). But see infra note 11. The execution prices of these sixty-three transactions fluctuated between a low of $0.0027 per share and a high of $0.0088 per share (DX 46, DX 48, DX 49). In comparison, Roanoke traded at a price of $0.0485 per share on December 9, 2002, a date on which the stock is not alleged to have been manipulated (DX 49 at 1).

On November 20, 2003, before Newbridge received the first Roanoke stock certificate, Bojadzijev asked Kantrowitz to represent him by offering to sell 5,000 Roanoke shares at $0.0049. He did this in order to "test" the market (Tr. 198-200, 516-19; DX 65). Kantrowitz informed Bojadzijev that he had no shares to sell, but that Kantrowitz himself had 10,000 shares, which he then offered to the market at $0.0049 (Tr. 199-203, 518-19). The daily trade blotter shows that this transaction was posted to Newbridge's proprietary account, but not to Bojadzijev's personal account (DX 49 at 1, 19).

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[8] To "buoy" is to keep afloat, to keep from sinking, or to support. See WEBSTER'S THIRD NEW INT'L DICTIONARY 297 (1971). In contrast to Roanoke, the OIP alleges that Kantrowitz manipulated Concorde, not by "buoying" its price, but rather, by moving it upward from $0.01 to $3.00 per share (OIP ¶ D.17), and then, by "rapidly manipulat[ing] Concorde's share price upward from $1.75 to $5.45 over a period of an hour and twenty minutes" (OIP ¶ D.22). As we shall see, the price volatility of Roanoke stock was negligible in absolute dollar terms, while the price volatility of Concorde stock was extreme in absolute dollar terms.

[9] Kantrowitz never deleted any instant messages (Tr. 190-91; DX 103). However, there are gaps in the instant message exhibit between December 2 and 10, between December 13 and 19, and between December 20 and 29, 2003 (DX 65).

On November 28, 2003, Bojadzijev asked Kantrowitz to represent him on a bid for 5,000 shares of Roanoke at $0.0031 and specifically to bid another market maker, Wien, who was alone at the inside ask at $0.0032, for 200,000 shares (Tr. 220-28, 527-30; DX 47, DX 65). Bojadzijev wanted Wien "out of the way," i.e., he wanted to move Wien off the inside ask (Tr. 528). Unless Wien moved off the inside ask, Bojadzijev would have been unable to raise his bid price from $0.0031 to $0.0032 without "locking the market" (Tr. 221-22).[10] After Kantrowitz bid Wien at $0.0032, Wien sold Newbridge 100,000 shares and moved off the inside ask, as it was required to do (Tr. 221-23, 226-28, 529-30; DX 47, DX 65).[11] Bojadzijev then directed Kantrowitz to lower his ask to $0.0033 and raise his bid to $0.0032 (Tr. 224, 529; DX 47, DX 65).

On December 2, 2003, Bojadzijev told Kantrowitz that he "want[ed] to make 150K profit next batch trying to move this up" (DX 65, Dec. 2, 2003, at 10:45:44). At the time, Kantrowitz did not respond to Bojadzijev. At the hearing, Kantrowitz explained his understanding was that Bojadzijev wanted to make $150,000 profit on the second 50 million share Roanoke certificate by trying to move up the price of the stock (Tr. 213-14).[12]

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[10] A locked market occurs when the highest quoted bid price equals the lowest quoted ask price. Domestic Secs., Inc. v. SEC, 333 F.3d 239, 244 (D.C. Cir. 2003).

[11] Wien sold Newbridge 100,000 shares of Roanoke at $0.0032 at 09:25:07 and Kantrowitz so informed Bojadzijev at 09:25:28 (DX 47, DX 65). Newbridge never posted this transaction to Bojadzijev's account (DX 46, DX 48, DX 49 at 19). When the Division argues that Bojadzijev purchased "only" 620,000 shares, it does not include these 100,000 shares.

[12] Bojadzijev received proceeds of approximately $160,622 for liquidating the first 50 million share certificate (DX 46, trades ## 1-14, DX 49 at 19-20). He received proceeds of approximately $190,971 for liquidating the second 50 million share certificate (DX 46, trades ## 15-26; DX 49 at 20). Because the record does not show the cost of the certificates to Bojadzijev, there is no basis for ascertaining his profits, as distinguished from his proceeds.

As discussed in note 9 supra, there is no evidence of instant message traffic between December 2 and 10, 2003. Nor is there evidence of specific bids Newbridge may have posted after November 28, 2003 (DX 47). During the relevant period, Newbridge made 615 total bid changes in Roanoke: 315 bid changes up and 300 bid changes down (DX 47, last page).

Data for the first seven trades under the second certificate (approximately 19 million shares) actually show execution prices stable or falling: $0.0031, $0.0032, $0.0032, $0.0031, $0.0031, $0.0031, $0.0029 (DX 46, trades ## 15-21). Data for the last five trades under the second certificate (approximately 31 million shares) show execution prices rising: $0.0037, $0.0042, $0.0043, $0.0043, $0.0044 (DX 46, trades ## 22-26). Accordingly, there is a limited basis for inferring that Bojadzijev took action to move up the price when he liquidated the second certificate.

OIP ¶ F.32 alleges that Kantrowitz knew that Bojadzijev had "no interest" in buying Roanoke shares. Kantrowitz was aware that Bojadzijev's primary objective was to sell large blocks of Roanoke shares (Tr. 509-10, 549-50). Nonetheless, over several weeks, Bojadzijev also requested Kantrowitz to place frequent small bids for Roanoke stock (Tr. 140-41, 204-06, 213-14, 219, 508-09, 519-20, 522-23, 526-27, 529-31; DX 65). When Kantrowitz, acting as a market maker, posted simultaneous bids and offers with respect to Roanoke at the direction of Bojadzijev, it appeared to other market participants as if Newbridge was representing two separate customers: one, a buyer, and the other, a seller. Market participants could not tell if or when the same Newbridge customer placed both the smaller bids and the larger offers (Tr. 219). As one instant message exchange demonstrates, both Kantrowitz and Bojadzijev delighted in the results of these mixed signals (DX 65, Dec. 12, 2003, beginning at 13:26:26):

> Bojadzijev: [laugh out loud,] on the message boards, they think we are short [laugh out loud]
> Kantrowitz: yeah, one of my buddies always show[s] me what they say during the day. . . I think it's pretty amusing. . . doesn't any of them have a brain? Or a clue.
> Bojadzijev: Well, when you play both sides, they think either you're short or making a mill.

Between November 20, 2003, and January 2, 2004, Newbridge was the exclusive high bidder for Roanoke 119 times (DX 47). The next closest market makers were at the exclusive high bid 82 and 78 times, respectively (DX 47). During this period, Newbridge shared the high bid with other market makers 300 times (DX 47). The next closest market makers shared the high bid 139 and 70 times, respectively (Tr. 523-25; DX 47).[13] Analyzing the data a different

[13] The last two pages of DX 47 represent summary data from the National Association of Securities Dealers (NASD) (Tr. 2475). The Division assumes that, when these data show Newbridge bidding on Roanoke during November and December 2003, it must have been Kantrowitz acting for Bojadzijev. The assumption rests principally on Bojadzijev's one-word response to a leading question about whether the data in DX 47 were consistent with his recollection of the bids he directed Kantrowitz to post on his behalf five years earlier (Tr. 525). Testimony of this precision, based on Bojadzijev's cursory review of a complex summary document, was only slightly believable. Additional support for the Division's assumption comes from the instant message traffic, which shows Bojadzijev directing Kantrowitz to bid on Roanoke dozens of times during the relevant period (DX 65). Most of these bids occurred between December 10 and 12, 2003 (DX 65). It is a long way from the several dozen bids Bojadzijev has been proven to have made to the 419 times that Newbridge led or shared the inside bid.

The Division's assumption is undercut by evidence that Bojadzijev was not the only Newbridge customer bidding on Roanoke during the relevant period. For example, Phoenix Group Consultants, a customer of William Herlihy (Herlihy), bought and sold 500,000 shares of Roanoke through Newbridge on December 9, 2003 (DX 49 at 23). In addition, Newbridge entered a round trip Roanoke transaction in its proprietary account on November 21, 2003 (DX 49 at 2). No corresponding transaction appears in Bojadzijev's account (DX 49 at 19). The

way, Newbridge was the exclusive high bidder 23.1% of the time, while the next closest market makers were the exclusive high bidders 1.9% and 1.8% of the time, respectively (DX 47). Newbridge shared the high bid 49.3% of the time, while the next closest market makers shared the high bid 23.8% and 18.7% of the time, respectively (DX 47).

Kantrowitz could tell at all times on his Level III computer screen whether the bids and asks he placed on behalf of Bojadzijev were inside bids and inside asks, either exclusive or shared (Tr. 241). Kantrowitz knew that Bojadzijev had a Level II computer screen and that Bojadzijev could see at all times where the inside bid and inside ask were with respect to Roanoke (Tr. 213, 475-77, 527).

Kantrowitz asserted that Bojadzijev was a statistician and an excellent mathematician who liked to trade penny stocks, not just liquidate them, and who had a short-term trading strategy (Tr. 141, 207). Bojadzijev, a high school dropout, may well have told this to Kantrowitz, as he later did to Gregg Breitbart (Breitbart), Newbridge's in-house general counsel (Tr. 2646). However, the notion that Kantrowitz actually believed this fable is rejected as preposterous.[14] Most of Bojadzijev's bids for Roanoke were for the smallest permissible quantity (5,000 shares), and virtually none of these bids resulted in transactions. As noted, Kantrowitz posted a large number of bids on behalf of Bojadzijev during November and December 2003, but Newbridge bought Roanoke stock for Bojadzijev's account only twice (DX 46, DX 49 at 21).

Bojadzijev was more candid about his reasons for posting so many bids: "I wanted to be the high bid on [Roanoke] to make it look a little bit better. And . . . to find out how much selling might come in at that level" (Tr. 526-27).

Bojadzijev demonstrated to Kantrowitz that he had advance knowledge of information or news coming out about Roanoke (Tr. 210-12, 228-29, 252-53, 531-38; DX 65). Bojadzijev was aware of such news because D. Smith sent him draft press releases for his review and comment before Roanoke issued them to the public (Tr. 531-37; DX 50, DX 51). Kantrowitz never asked Bojadzijev how he knew that such news was about to be released (Tr. 211, 228-29, 253, 532-34, 537-38). Kantrowitz expressed a very narrow understanding of whether such activity might be insider trading and whether Newbridge policy required him to report it to his supervisors (Tr. 211-12, 253-54; DX 117 at 121-22).

Division does not contend that this was another "test" transaction, similar to the one that Kantrowitz executed for Bojadzijev a day earlier. In the absence of order tickets or comparable evidence, I decline to speculate whether this might be the transaction discussed in the Division's Proposed Finding of Fact # 241.

[14] Kantrowitz could not remember asking Bojadzijev about his educational background (Tr. 141-42). Newbridge's customer profiles erroneously stated that Bojadzijev had "some college" experience (DX 40, DX 41). The parties did not explore the reason for the discrepancy between the customer profiles and Bojadzijev's hearing testimony (Tr. 453-54).

3. Newbridge Closes Bojadzijev's Account.

As early as December 11, 2003, Breitbart requested that Bojadzijev come to the Newbridge office to discuss his account (Tr. 488, 538-39, 2644-46). When the meeting eventually took place in late December 2003 or early January 2004, it lasted only fifteen minutes. Breitbart determined that Newbridge should not conduct further business with Bojadzijev and recommended that his account be closed (Tr. 436-37, 539, 2646-47).[15] Newbridge closed the account shortly thereafter and Bojadzijev moved his remaining positions in Roanoke to another brokerage firm (Tr. 472, 554, 2646-47).

4. Resulting Litigation

On December 21, 2005, the Commission filed a civil injunctive action against Roanoke, D. Smith, Bojadzijev, and others for their participation in a fraudulent S-8 scheme (Tr. 541). SEC v. Roanoke Tech. Corp., No. 6:05-CV-1880-ORL-31 KRS (M.D. Fla.) (official notice). The Commission's complaint alleged violations of the antifraud, registration, and reporting requirements of the federal securities laws.[16]

Roanoke consented to all the non-monetary relief sought in the amended complaint, without admitting or denying the Commission's allegations. The court entered a final judgment of permanent injunction against Roanoke on September 27, 2006. The court dismissed the Commission's monetary claims against Roanoke.

Bojadzijev also consented to the non-monetary relief sought in the amended complaint, without admitting or denying the Commission's allegations. The court enjoined Bojadzijev from future violations of the antifraud, registration, and reporting provisions of the federal securities laws and imposed a penny stock bar on January 3, 2007. After further proceedings, the court ordered Bojadzijev to pay disgorgement of $2,681,866, prejudgment interest of $291,565, and a civil penalty of $120,000 on August 31, 2007.[17]

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[15] On December 31, 2003, Newbridge received a deficiency letter from the staff of the Commission's Southeast Regional Office, discussing the sale of unregistered securities and other issues (DX 115). See infra pp. 35-36. Without knowing the date of the Breitbart-Bojadzijev meeting, the record will not permit any inference as to whether the decision to close Bojadzijev's accounts represents independent action on Newbridge's part, or whether it may have been prompted by the deficiency letter from the Commission's staff.

[16] The Commission's original and amended complaints did not name Newbridge, Amico, Goldstein, Vallejo, or Kantrowitz as defendants. Moreover, the complaints did not allege that Roanoke, D. Smith, Bojadzijev, or anyone else manipulated the market for Roanoke stock.

[17] The judicial disgorgement order involved Bojadzijev's ill-gotten gains over an eleven-month period, during which he sold 950 million shares of Roanoke stock through three different brokerage firms. Bojadzijev traded through Newbridge only for the first two months of this period. OIP ¶ F.37 alleges that Bojadzijev received over $1.1 million in proceeds from the sale of Roanoke stock at Newbridge. That figure finds support in the record (DX 48, DX 49), but it

On June 8, 2008, Bojadzijev pleaded guilty to criminal charges of conspiracy to engage in wire fraud between November 2003 and September 2004, in connection with his activities in Roanoke stock. He also pleaded guilty to criminal charges of willfully failing to file federal income tax returns from 2002 through 2005 (Tr. 544; RX 151). The court sentenced Bojadzijev to a term of six years of incarceration (Tr. 545).

In his plea agreement, Bojadzijev admitted to several facts that were not proven in this administrative proceeding (RX 151 at 15-18). These include the following:

- Bojadzijev's guilty plea to wire fraud involved misconduct that occurred over an eleven-month period (November 2003 through September 2004), involved three different brokerage firms, and the liquidation of 950 million shares of Roanoke S-8 stock. In contrast, the present proceeding involves 233 million shares of Roanoke traded through the first such brokerage firm (Newbridge) during the first two months of a lengthy scheme;

- Bojadzijev arranged for the dissemination into the market of materially false and misleading information (press releases) to generate market demand for Roanoke stock; and

- D. Smith issued Roanoke stock to Bojadzijev in blocks of 50 million shares to evade the Commission's reporting requirements. However, there were instances where Bojadzijev's holdings of Roanoke stock in fact triggered the Commission's reporting requirements. Bojadzijev did not file required registration statements with the Commission.

B. Concorde

1. Concorde, its Founders, and its Promoters

Concorde was a Nevada corporation, with its principal place of business in Boca Raton, Florida.[18] Its president was Hartley Lord (Lord) (Tr. 605).[19] In June 2004, Concorde purchased a publicly traded shell corporation that was controlled by Donald Edward Oehmke (Oehmke) (Tr. 607). Through a reverse merger, Oehmke changed the corporation's name from MBC Food Corporation to Concorde (Tr. 607-08). Concorde had no business operations until June 2004.

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reflects both funds retained by Bojadzijev and funds that Bojadzijev kicked back to D. Smith. The judicial disgorgement order did not require Bojadzijev to disgorge funds he had kicked back to D. Smith.

[18] The Nevada Secretary of State revoked Concorde's charter on April 1, 2006 (official notice).

[19] In 1981, Lord consented to a permanent injunction against future violations of the antifraud provisions of the federal securities laws. See SEC v. Liederman, No. 81-2315 TJH (Px) (C.D. Cal.), 23 SEC Docket 955 (Sept. 21, 1981).

Thereafter, it claimed to transport temporary workers from Latin America to Europe to harvest agricultural products (Tr. 604-05).

Concorde's securities were never registered with the Commission. They are quoted on the Pink Sheets.[20] When Concorde's stock traded below $5.00 per share, it was "penny stock" within the meaning of Section 3(a)(51)(A)(iv) of the Exchange Act and Exchange Act Rule 3a51-1. Concorde's stock was not "penny stock" when it traded at and above $5.00 per share.[21]

Oehmke, age fifty-nine, is a resident of Kalamazoo, Michigan (Tr. 570). He holds a B.S. degree from Nazareth College and a master's degree in public administration from Western Michigan University (Tr. 719-20). Between 1985 and 1990, Oehmke was chairman and part owner of a retail brokerage firm in Arizona (Tr. 572-73). At those times, he held several securities licenses and acted as a trader, market maker, and compliance supervisor (Tr. 573-74).

In 1991, the Arizona Corporation Commission and the NASD brought separate disciplinary actions against Oehmke for participating in a fraudulent scheme to misappropriate customer funds, disseminating misleading sales literature, and maintaining inadequate supervisory procedures, among other things (Tr. 575-77). Oehmke settled the proceedings by agreeing to revocation of his Arizona securities sales license and accepting a bar from association with any NASD member firm in any capacity (Tr. 576). See In re Offering of Secs. by Boucher, Oehmke & Co., Arizona Corporation Commission Decision No. 57594, 1991 Ariz. Sec. LEXIS 185 (Nov. 6, 1991); Disciplinary Actions Reported for October 1991, 1991 NASD LEXIS 113 (Oct. 1991).

Oehmke was another referral customer on whose behalf Kantrowitz traded penny stocks (Tr. 270-71, 578-80). He opened a Newbridge account in the name of his company, Ventana Consultants, Ltd. (Ventana), in September 2003 (Tr. 273-74, 570, 583-84; DX 67). Oehmke told Kantrowitz he was a consultant for various companies and received stocks as compensation (Tr. 274, 583). When Oehmke opened Ventana's account, he deposited a stock certificate for liquidation (Tr. 275; DX 67). Kantrowitz did not ask Oehmke any questions about his

[20] The Pink Sheets is an electronic inter-dealer quotation system that displays quotes and last-sale information for many over-the-counter securities. The name comes from the color of paper used when the sheets circulated in hard copy. Unlike the OTCBB, the Pink Sheets does not require companies whose securities are quoted on its system to meet any listing requirements. Many of the companies listed on the Pink Sheets, including Concorde, do not file periodic reports or audited financial statements with the Commission.

[21] See James E. Franklin, 91 SEC Docket 2708, 2711-12 & n.10 (Oct. 12, 2007); Edward Becker, 82 SEC Docket 3893, 3902-03 (June 3, 2004) (Initial Decision), final, 83 SEC Docket 920 (July 6, 2004); Robert G. Weeks, 76 SEC Docket 2609, 2663-65 & n.26, 2673 (Feb. 4, 2002) (Initial Decision), aff'd on other grounds, 56 S.E.C. 1297 (2003). I incorporate by reference the discussions in these proceedings as to what is excluded from the penny stock definition.

background or what kind of consulting work he did for these companies (Tr. 581-83). Herlihy was the broker of record on Ventana's account (Tr. 270, 275, 584; DX 67).

Bryan Kos (Kos) and Jeremy Jaynes (Jaynes) marketed public companies to investors, promoting the companies over the internet, by electronic mail and facsimile messages, or through telephone calls (Tr. 299, 589-90).[22] Kos was also a customer of Kantrowitz's or Herlihy's, and he, too, deposited certificates with Newbridge for liquidation (Tr. 297-98; DX 39). Well before Concorde began to trade, Kos solicited Kantrowitz in efforts to locate Pink Sheet shell corporations for reverse mergers and so-called Rule 504 transactions (DX 39, Sept. 9, 2003, at 10:23:46, Oct. 8, 2003, at 10:44:07). Kantrowitz knew that Kos and Jaynes were partners (DX 39, Oct. 8, 2003, at 10:38:43, Oct. 9, 2003, at 9:41:32 and 10:00:59, Jan. 5, 2004, at 12:26:45).

In early 2004, Kos and Jaynes employed Oehmke to trade their securities accounts (Tr. 586, 588, 590). Kos and Jaynes paid Oehmke $1,000 per day (or $5,000 per week) to manage the assets in their brokerage accounts because they did not want to do it personally (Tr. 588, 724). I infer that Kos and Jaynes wanted Oehmke to trade their securities accounts so they could maintain an extra layer of secrecy between themselves, their promotional activities, and any related stock transactions. Oehmke's experience as a former trader and market maker made him well suited for the assignment.

Oehmke had some unique requirements when choosing the market makers who would trade the Kos-Jaynes accounts: he wanted to do business with traders who could make markets promptly and do exactly as he instructed, without delay (Tr. 586-87). Oehmke explained this to Kantrowitz, who responded "okay" (Tr. 587). Oehmke considered Kantrowitz to be an excellent trader, well attuned to the market and knowledgeable about low price securities (Tr. 593-94).

Oehmke then opened trading accounts for Kos and Jaynes at Newbridge in the names of several offshore entities. At all relevant times, Oehmke exercised trading authority in these offshore accounts (Tr. 276-77, 596). Kantrowitz was the broker of record on these offshore accounts, and he knew that Kos had referred the accounts to him (Tr. 277; DX 39, Jan. 14, 2004, at 14:58:44). One of these foreign accounts was for Barranquilla Holdings, S.A. (Barranquilla), a company incorporated in Anguilla, British West Indies (Tr. 276-77; DX 70). Another such account was for Ryzcek Investments, GMBH (Ryzcek), a Trinidadian corporation (Tr. 596, 613; DX 69).

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[22] Kantrowitz understood that one of the things Kos did was to try to increase a company's share trading volume through "investor relations" (Tr. 305, 307-08, 311; DX 39, June 25, 2003, at 15:33:55 and 15:46:01, Oct. 8, 2003, at 10:28:38, 10:42:37, and 14:43:27).

Jaynes was a "spammer." From his home in North Carolina, Jaynes used several computers, routers, and servers to send the public unsolicited bulk e-mail ("spam"), advertising penny stocks and other products. See Jaynes v. Commonwealth, 276 Va. 443, 448, 450 & n.5 (2008) (holding unconstitutional the anti-spam provision of the Virginia Computer Crimes Act, and vacating Jaynes' criminal conviction), cert. denied, 129 S. Ct. 1670 (2009).

2. Oehmke and Kos Meet with Kantrowitz and Separately with Warren Hansen.

On June 22, 2004, Oehmke and Kos met with Kantrowitz and his trading desk assistants at a restaurant (Tr. 299, 616; DX 94 at 201-03). During the meeting, they discussed a company that would become involved with bringing workers from one country to another (Tr. 300, 616-17). Oehmke told Kantrowitz that he did consulting work for this company, and Kos told Kantrowitz that he would promote the company's stock (Tr. 304-05, 617, 665, 669). Kantrowitz later learned that the company was Concorde (Tr. 300, 304).

At the hearing, Kantrowitz purportedly could not recall that Kos was involved with Concorde (Tr. 299). I consider this testimony to be incredible, inasmuch as Kantrowitz even passed telephone messages for Kos through Oehmke (DX 94 at 259). I find as a fact that Kantrowitz knew, no later than June 22, 2004, Kos would be promoting the company.

At this meeting, Kos also told Kantrowitz that he and Oehmke had just come from a meeting with "Warren" (Tr. 617-18). Oehmke testified that he believed, based on Kantrowitz's reaction, that Kantrowitz knew that Kos was referring to Warren Hansen (Hansen) of Sunstate Equity Trading, Inc. (Sunstate), another Florida brokerage firm (Tr. 617-18). Hansen was the only Sunstate trader with whom Kantrowitz did business (Tr. 327).

3. Oehmke Controls the Public Float of Concorde Stock during July and August 2004.

The transfer agent's records show that there were approximately 10 million shares of "freely trading" Concorde stock during July and August 2004 (Tr. 612, 635; DX 76, DX 77).[23] Oehmke deposited all of that stock in accounts he controlled at Newbridge and Sunstate (Tr. 612-13, 635).

On July 19, 2004, Concorde issued 10 million shares of stock to an entity controlled by Oehmke (Tr. 610, 612; DX 76, certificate # 2109). Oehmke then caused the transfer agent to reregister these shares in the names of several offshore companies, including the Kos-Jaynes companies (Tr. 609-13, 635; DX 76, certificates ## 2110-29).

On July 23, 2004, Oehmke transferred two certificates, totaling 1,000,000 shares, of Concorde stock into the Barranquilla account at Newbridge (Tr. 278-79; DX 73, certificate ##

[23] The parties use the term "freely trading" stock, which is misleading. The transaction by which Concorde issued securities was either registered, exempt from registration, or illegal. The parties agree that there was never a registered public offering of Concorde stock. Oehmke claimed that these 10 million shares were exempt from registration, both initially and on resale, pursuant to Rule 504 of Regulation D, 17 C.F.R. § 230.504 (Tr. 606-11). The Division did not challenge the validity of the claimed exemption. Concorde filed its Form D, Notice of Sale of Securities Pursuant to Regulation D, with the Commission on July 12, 2004 (official notice).

2128-29). An unidentified Newbridge employee prepared an incomplete stock certificate deposit questionnaire (Tr. 278-79, 283; DX 73). Kantrowitz was the broker of record, but he did not sign the Barranquilla stock certificate questionnaire (Tr. 277, 279; DX 73). The shares went into street name on July 30, 2004 (DX 73). Oehmke testified that additional shares went into the Ryzcek account at Newbridge (Tr. 596, 613). However, there is no corroborating evidence, such as purchase and sale statements, monthly account statements, or stock certificate questionnaires, to quantify the number of shares in Ryzcek's Newbridge account. Kantrowitz knew that there were Concorde shares at Sunstate no later than July 27 (Tr. 363; DX 82, DX 83). However, there is no evidence that Kantrowitz knew how many Concorde shares Oehmke controlled away from Newbridge.

4. Kantrowitz Helps Oehmke Create the False Impression that the Market for Concorde Is Active.

On June 30, 2004, Oehmke directed Kantrowitz to place a bid for 10,000 shares of Concorde stock at $1.01 per share (Tr. 315-16; DX 94 at 215). About a minute earlier, Hansen at Sunstate had also entered a bid at $1.01 (Tr. 328-29; DX 95 at 1). Before these two bids on June 30, there had been almost no bid activity in Concorde for the previous month (Tr. 329; DX 95 at 1). The only executed Concorde transactions between June 4 and July 20 were for a couple of shares each (DX 96 at 1). These represented book-clearing trades, intended to remove shares with little or no value from a brokerage's records (Tr. 632-33).

Between June 30 and July 26, 2004, Oehmke placed numerous increasing bids for Concorde stock through Kantrowitz and Hansen (DX 94 at 215-49, DX 95 at 1-2). Oehmke directed most of his bids at Newbridge through the Barranquilla account, but he placed a few bids at Newbridge through the Ryzcek account (DX 94 at 225, 229, 234). The bid prices for Concorde increased from $1.01 per share to $3.00 per share during that period, without a single transaction taking place (DX 95 at 1-2, DX 96 at 1). Oehmke offered two explanations for these bids: first, he wanted to determine if anyone was holding Concorde shares and desired to sell them; and second, Kos and Jaynes wanted him to "elevate the price" of Concorde to $3.00 per share, which, they believed, would make it easier to sell their ten million shares (Tr. 645-47). Hansen asked Oehmke if he had accounts at Newbridge and if they were reflecting his bids at Sunstate, and Oehmke replied "yes" (Tr. 648). In contrast, Kantrowitz never asked Oehmke any questions about why he was posting continuously higher bids, or why Sunstate was posting bids at prices identical to Newbridge's bids (Tr. 647-48).

On July 27, 2004, Oehmke told Kantrowitz he needed "two offers up there that show[] up on everybody's level II" computer screen (DX 82, DX 83). Oehmke wanted two brokers to display offers because Pink Sheet quotations could not be seen by market participants who did not have Level III computer screens unless there were at least two bids and two offers for a given security (Tr. 359, 648-49, 671, 674-75). At the time, Newbridge did not hold Concorde stock in street name, and it could not legitimately post an offer (DX 94 at 215). Sunstate did hold Concorde stock in street name, and it had posted an offer (Tr. 367, 672, 674; DX 95 at 2). Oehmke told Kantrowitz to expect a telephone call from a market maker who would ask him to "reflect" its offer (Tr. 670; DX 94 at 250). Kantrowitz then spoke with Hansen at Sunstate and agreed to "reflect" Sunstate's offer on Concorde. In return, Oehmke promised to pay Kantrowitz

a commission (Tr. 357, 363, 675; DX 82, DX 83, DX 94 at 250). Kantrowitz displayed an offer as requested, but at a higher price (Tr. 364, 676; DX 95 at 2). Kantrowitz and Oehmke suggest that this was legitimate order flow activity (Tr. 354-55, 670-71, 675). However, it is unusual for a customer to ask one market maker to "work" an order for another market maker, and I consider this strong evidence of collusion among Kantrowitz, Hansen, and Oehmke (DX 124 ¶ 13).

5. Kos and His Associates Pump Concorde.

Kos hired Paul Spreadbury (Spreadbury) and Thomas Heysek (Heysek) to promote Concorde (Tr. 664). Oehmke knew that Kos and his associates were going to implement an electronic mail and facsimile campaign that would cause Concorde shares to sell more readily (Tr. 646). Kos was ready to begin this campaign as soon as Oehmke told him that the Concorde shares were in street name and cleared to trade (Tr. 659, 662).

On July 28, 2004, Spreadbury issued a press release announcing that Concorde had obtained a contract with the Spanish government to provide employment placement services (Tr. 663-64; DX 80). The press release purported to quote Lord, Concorde's president, who characterized the contract as "the tip of the proverbial iceberg." Lord predicted that "[o]nce this first contract is underway . . . , we anticipate the floodgates to open" (DX 80). Spreadbury also quoted Heysek, described as a "noted financial advisor," who recommended Concorde to the public as "a strong buying opportunity" (DX 80). Thereafter, Kos and his associates continued to send out facsimiles and e-mails about Concorde (Tr. 615).

There is no evidence that Kantrowitz reviewed specific promotional materials about Concorde in advance of their public release. Oehmke testified that he and Kantrowitz were uncertain about Kos' specific promotional activities at the time they were occurring (Tr. 614-15, 682-83, 685, 726-28). However, Kantrowitz was well aware that Kos was a stock promoter (Tr. 307-08). In fact, on an earlier occasion unrelated to Concorde, Kantrowitz had rebuked Kos for carelessly describing his work as "pumping" e-mails (Tr. 308-09; DX 39, June 25, 2003, at 15:46:01). In reply, Kos had retracted his Freudian slip and employed the more benign phrase, "sending" e-mails. Kantrowitz replied: "[laugh out loud] . . . EXACTLY" (Tr. 309; DX 39, June 25, 2003, at 15:47:17-:24).

Oehmke and Kantrowitz exchanged the following instant messages on August 5, 2004 (Tr. 667-69; DX 94 at 309):

> Oehmke: [Concorde] is the [thirteenth] most requested stock [on] the pinks [today].
> Kantrowitz: Nice. . . . some of my people got a buy [recommendation] fax on it. . . . called me and told me.
> Oehmke: [R]eally? I wonder who sent that???

The evidence about the pumping campaign is limited. There is proof of one "pump" on July 28, 2004, and a great deal of speculation about whether Oehmke and Kantrowitz knew what else Kos, Spreadbury, and Heysek may have been doing. There is no evidence as to when or how Jaynes may have pumped Concorde.

6. Oehmke Dumps Concorde Shares.

Between July 27 and August 11, 2004, Concorde's price rose from approximately $3.00 per share to $8.90 per share (DX 96 at 1-161). Trading volume also rose exponentially (Tr. 682). According to Oehmke: "[A]t the opening of the market on a given day, there would be 5,000 orders waiting to purchase this security that a week ago didn't trade, and those 5,000 orders were market orders. . . . [People] didn't care what they paid for it. That's why the price of the stock would just skyrocket" (Tr. 727). Kantrowitz was well aware of both the price volatility and the high trading volume (Tr. 376-81; DX 94 at 317, 353, 373).

During this period, Kantrowitz was able to liquidate shares of Concorde on behalf of Barranquilla, as directed by Oehmke. As illustrations, Kantrowitz sold at least 140,000 Concorde shares on August 6, and at least 130,300 shares on August 9 (DX 94 at 329-30, 341). On August 10, Barranquilla held 603,800 Concorde shares in its account (DX 94 at 351).

The evidence about the dumping campaign is also limited. Although OIP ¶ D.15 alleges that Oehmke sold 1.5 million Concorde shares and generated proceeds of $5.8 million, there is no evidence to support these charges. The Barranquilla and Ryzcek trade blotters and monthly account statements are not in evidence, either.

7. August 13, 2004: Kantrowitz Enters Increasing Bids, Identical to Those Posted by Hansen at Sunstate.

On August 11, 2004, Concorde issued a press release disavowing some of the information contained in the July 28 press release (DX 81). On August 12, 2004, the trading price of Concorde stock plummeted from a high of $8.89 per share to a low of $2.37 per share (Tr. 382-83; DX 96 at 161-238). On the morning of August 13, 2004, the trading price of Concorde stock continued downward and reached a low of $1.75 per share (Tr. 383; DX 96 at 238-39).

During the rest of the morning on August 13, Oehmke placed numerous bids with Kantrowitz on behalf of Barranquilla (Tr. 384-86, 688, 692-98, 701-06; DX 94 at 405-12).[24] Oehmke directed Kantrowitz to update these bids to follow the increasing bids that were being posted by Hansen at Sunstate (Tr. 390-92, 693-98, 711; DX 95 at 143-75). Kantrowitz posted several successive bids for 200,000 shares of Concorde stock in short intervals. He did so by constantly cancelling his former order and reentering another 200,000 share bid at a higher

[24] Oehmke characterized August 13 as a "fast market" (Tr. 698-99). Exchange officials can declare "fast market" conditions, with the result that displayed quotes are not firm and volume guarantees are not applicable. However, exchange officials must periodically monitor those conditions. The Pink Sheets is not an exchange or a self-regulatory organization, and no mechanism exists to declare "fast market" conditions there. I understand Oehmke to be testifying only that trading was brisk on August 13.

price.[25] Until approximately 11:00 a.m., none of Oehmke's orders was executed (DX 94 at 405-12, DX 124 ¶ 16).

Oehmke hoped to thwart short sellers who, he believed, had taken advantage of Concorde's August 12 price decline (Tr. 699-700). He wanted two identical inside bids to avoid having any short sellers "pounding on the bid" (Tr. 706-07). Oehmke also wanted to maintain a one penny spread between the inside bid and the inside offer (Tr. 706-07). His primary purpose was to move up Concorde's price, so that he could sell the stock he controlled at a higher price (Tr. 706-07). He only intended to buy whatever shares were necessary to stop the short selling (Tr. 707). Kantrowitz followed Oehmke's instructions.

At around 10:55 a.m. on August 13, Oehmke attempted to increase the bid for Concorde placed through Newbridge to 200,000 shares at $5.48 per share (DX 94 at 412). The bid was not entered because Kantrowitz had left the trading desk (Tr. 386). As a result, the inside bid moved away from the bid price that Kantrowitz had previously entered for Oehmke, and Oehmke ended up buying 100,000 shares of Concorde at a cost of more than $500,000. The purchase was executed at another brokerage firm when one of Oehmke's accounts was the lone inside bidder (Tr. 388-89).[26] Oehmke placed an angry and abusive telephone call to Kantrowitz, complaining about the transaction, even though his 100,000 share purchase was only half the 200,000 shares he had been directing Kantrowitz to buy all morning (Tr. 387, 709-11; DX 86, DX 87, DX 94 at 412, DX 124 ¶ 16). Oehmke went on to tell Kantrowitz to keep the penny spread and, whenever Sunstate moved, to join it on the inside bid (DX 87 at 3). Kantrowitz responded that he understood (DX 87 at 3-4).

The price of Concorde continued to increase for another hour, reaching a high of $8.45 per share at 12:14 p.m. (DX 96 at 289-310).

8. Developments from August 16 to October 22, 2004

Barranquilla purchased more than 756,000 shares of Concorde stock through Newbridge on August 13 (DX 94 at 425-26, DX 132). Barranquilla settled the purchases in a timely manner, paying approximately $5.5 million in cash on August 18 (DX 132; RX 80, RX 81).

Oehmke insisted that Newbridge and its clearing broker, NFS, require the August 13 sellers to make physical delivery of the Concorde certificates to Barranquilla (DX 132). After the sellers failed to deliver the physical stock certificates, Oehmke demanded that Newbridge

[25] This finding is based solely on the instant message traffic (DX 94 at 405-12). The bid price and bid quantity data in DX 95 do not correspond to anything in the instant message traffic in DX 94. The parties have offered no explanation for the discrepancy.

[26] This finding is based on the instant message traffic and the recorded telephone conversation between Oehmke and Kantrowitz (DX 86, DX 87, DX 94 at 412). Oehmke's 200,000 share bids and the 100,000 share purchase do not correspond to anything in the audit trail data (DX 95 at 175, DX 96 at 265-66). Once again, the parties have not explained the discrepancies.

and NFS bust the trades and return the approximately $5.5 million purchase price to Barranquilla (Tr. 712-14, 1649-50, 2656-57, 2659-60; DX 94 at 426, 429-30, 438, DX 132; RX 80, RX 81). He also threatened litigation (Tr. 1650, 2656; RX 88). For reasons not explained on the record, the August 13 sellers never delivered any stock certificates, Newbridge and NFS did not bust any trades, and Oehmke never filed a lawsuit.

Newbridge, which had just commenced a clearing relationship with NFS on August 4, abruptly moved its clearing operations back to Sterne Agee in September or October 2004 (DX 94 at 271, 450, 455). Oehmke's trading in Concorde shares fell off considerably in late August and September 2004, but it did not end entirely (Tr. 407, 2409; DX 94 at 428, 432-35, 459, 464-68, 470). However, by late October 2004, Newbridge closed some of the offshore accounts that Oehmke controlled, against Oehmke's wishes (Tr. 436, 714-15, 2660-61; DX 94 at 475-76). Ventana's account at Newbridge remained open (DX 94 at 482, 484).

9. Resulting Litigation

On February 14, 2005, the Commission filed a civil injunctive action, alleging that Concorde, Lord, Oehmke, Kos, Spreadbury, and Heysek violated Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 by participating in a "classic pump and dump" scheme to manipulate Concorde shares and the shares of another issuer.[27] SEC v. Concorde America, Inc., No. 05-80128-CIV ZLOCH (S.D. Fla.) (official notice). The next day, the court entered an ex parte temporary asset freeze against the defendants (Tr. 599, 739).

Oehmke eventually consented to the entry of final judgment, without admitting or denying the allegations in the Commission's complaint. On November 28, 2006, the court enjoined him from future violations of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. It also imposed a penny stock bar and an unregistered securities offering ban, and ordered Oehmke to disgorge $1,095,177, plus prejudgment interest of $109,307, and to pay a civil penalty of $250,000 (Tr. 715-16). Concorde consented to all non-monetary relief sought in the complaint, without admitting or denying the Commission's allegations. The court entered a final judgment of permanent injunction against Concorde on February 9, 2007.

10. Allegations in the OIP that the Division Did Not Prove

OIP ¶ D.15 alleges that, from June through October 2004, Kantrowitz enabled Oehmke to reap more than $5.8 million in sales proceeds by liquidating more than 1.5 million Concorde shares. Other than a July 27-August 3, 2004, round-trip transaction by Ventana which netted a trading profit of $5,264, there is no evidence as to the sales proceeds accruing to Barranquilla or

[27] The Commission's complaint did not name Jaynes, Newbridge, Amico, Goldstein, Vallejo, or Kantrowitz as defendants. The Department of Justice successfully pursued criminal charges against Jaynes. United States v. Jaynes, No. 5:06-CR-00054-WEB-CH (W.D.N.C.) (official notice). The Financial Industry Regulatory Authority (FINRA) barred Hansen from the securities industry because he failed to respond to written requests for information and documents. Dept. of Enforcement v. Hansen, 2008 FINRA Discip. LEXIS 2 (Jan. 10, 2008).

Ventana from transactions in Concorde stock. Likewise, there is no evidence as to the number of Concorde shares liquidated by Barranquilla, at Newbridge or elsewhere. Oehmke conducted limited trading activity in Concorde through Newbridge and Kantrowitz after August 13, 2004, but there is no evidence of an ongoing manipulation after August 13.

OIP ¶ D.16 alleges that Oehmke distributed ten million shares of Concorde to a number of offshore nominee entities that maintained brokerage accounts at Newbridge and another brokerage firm that also made a market in Concorde. There is evidence that Oehmke distributed one million shares of Concorde to Barranquilla and that Barranquilla deposited these shares at Newbridge. There is also evidence that Oehmke distributed nine million shares of Concorde to several other offshore entities (DX 76). However, there is no evidence that these other offshore entities traded Concorde through Newbridge.

OIP ¶ D.18 alleges that Oehmke had communicated to Kantrowitz that Oehmke intended to liquidate the large number of Concorde shares he deposited with the firm, in part, through an account he maintained at Newbridge. There is no evidence that Oehmke deposited any Concorde shares with Newbridge through his Ventana account and no evidence that he told Kantrowitz he was going to do so.

OIP ¶ D.20 alleges that Oehmke directed wash trades between accounts he controlled and that Kantrowitz followed Oehmke's instructions. The Division presented no evidence of any wash trades.[28]

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[28] "Wash trades," also known as "wash sales," are securities transactions involving no change in beneficial ownership. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 205 n.25 (1976); Richard D. Chema, 53 S.E.C. 1049, 1051 n.3 (1998). At one point, the Division believed that a 10,000 share transaction on July 27, 2004, was a wash trade. Oehmke held trading authority for accounts on both sides of the transaction: selling Concorde shares at Sunstate and purchasing these same shares in his Ventana account at Newbridge through Kantrowitz (Tr. 681-82; DX 124 ¶ 14). In addition, Oehmke twice requested that Kantrowitz keep the matter confidential (DX 94 at 252, 271-73). That supports an inference that Oehmke knew the transaction might not survive close scrutiny by compliance or regulatory officials.

Oehmke admitted that he used his Ventana account to trade ahead of his employers, Kos and Jaynes, knowing that they were going to take the price of Concorde higher (Tr. 681). Oehmke planned to sell the shares back to his employers in the future at a profit. Oehmke sold the shares on August 3, 2004, but the buyer is unknown (Tr. 681; DX 78, DX 94 at 271-73).

A broker "trades ahead" or engages in "front running" when he or she receives a large order for a particular security from a client and, before executing the large trade, first executes trades in that security for an account in which the broker has an interest, so as to anticipate and exploit the movement in price the larger trade is likely to cause. Cf. D'Alessio v. SEC, 380 F.3d 112, 114 (2d Cir. 2004). I find as a fact that Oehmke was involved in a form of "trading ahead" or "front running." The transaction in question was not a "wash trade" because beneficial ownership of the 10,000 shares passed from Kos and Jaynes to Oehmke.

OIP ¶ D.21 alleges that Kantrowitz complied with Oehmke's instructions to post increasing bids despite subsequent regulatory inquiries Newbridge received from the Division and FINRA with regard to Oehmke's trading activities in Concorde. There is no evidence of any regulatory inquiries to Newbridge from the Division or FINRA while the alleged manipulation was underway.

OIP ¶ D.22 alleges that the August 13, 2004, price rise in Concorde enabled Oehmke to liquidate additional shares at a substantial profit. There is no evidence to quantify the profitability of Oehmke's trading on August 13.

OIP ¶ G.48 alleges that Amico and Goldstein profited from Kantrowitz's misconduct through trading profits and transaction fees they indirectly received as owners of Newbridge. Amico and Goldstein explicitly denied that their compensation was tied to trading profits (Tr. 1215, 1540). The Division presented no evidence to quantify any such sums flowing to Amico and Goldstein.

III. SUPERVISION BY AMICO AND GOLDSTEIN

A. Newbridge Establishes a Trading Desk.

When Amico and Goldstein acquired Newbridge, the firm did not have market making capacity (Tr. 851-52). In 2001, Newbridge applied for and received approval from the NASD to establish a trading desk and become a market maker (Tr. 1197-98, 1336; DX 109).

1. Amico and Goldstein Delegate the Daily Supervisory Responsibility over Trading to Subordinates.

Newbridge's application for market making authority identified Amico as the firm's contact person and as having "ultimate supervisory authority" with respect to the firm's operations (Tr. 838-39; DX 109 at 3). Amico was also responsible for hiring and supervising registered representatives (DX 109, Tab 4, Appx. A). The application further stated that Goldstein had "ultimate supervisory authority with respect to sales and compliance and [would] be the report [person] for trading" (Tr. 1338; DX 109 at 3). Goldstein's other duties and responsibilities included hiring and supervising registered representatives, as well as ongoing compliance training and compliance review (DX 109 at 3).

Amico understood that the firm's supervisory system needed to include review procedures to ensure compliance with the antifraud provisions of the federal securities laws and the Commission's rules (Tr. 858-60). To that end, Newbridge represented to the NASD that the supervisory staff in the firm's trading area and compliance department would look for evidence of traders manipulating the market and that "[e]vidence of this review will be contained in [a] weekly checklist" (Tr. 860-61; DX 109, Tab 4 at 91).[29] As part of the application process, Newbridge also drafted written supervisory procedures for equity trading and market making

[29] Newbridge's first two chief compliance officers did not complete such weekly checklists (Tr. 890, 897, 966).

(Tr. 854-55, 1553-54, 1848, 2600-02; DX 109, Tab 4). Newbridge's chief compliance officer was responsible for updating the firm's written supervisory procedures on an annual basis (DX 109, Tab 4 at 86).

Amico and Goldstein appointed Vallejo as the firm's head trader and designated him as the principal responsible for supervision and compliance with respect to trading activity at the firm (Tr. 870-71, 1393-94; DX 109 at 2, Tab 3). The application represented that Vallejo would review all trading activity on a quarterly basis and on an as-needed basis to monitor for anti-competitive practices (Tr. 865-66; DX 109, Tab 4 at 112). It was up to Vallejo to decide what supervisory issues to bring to the attention of Goldstein (Tr. 1396).

Amico and Goldstein also appointed James L. Phelps (Phelps) as Newbridge's first chief compliance officer (Tr. 36, 880-81, 1371-72). Kenneth Brown (Brown) replaced Phelps as chief compliance officer in March or April 2002 and served in the position until October or November 2004 (Tr. 898, 1380-81, 1391, 2169, 2172, 2202-03; DX 111 at 4). Brown was chief compliance officer at the times of the Roanoke and Concorde transactions. Amico and Goldstein granted Brown autonomy over the compliance department and full responsibility for revising Newbridge's compliance manual and written supervisory procedures (Tr. 896-97, 1381-82, 1384, 1387, 1563). Brown had the authority to discipline any traders who violated Newbridge's policies and procedures (Tr. 2309). Amico and Goldstein left it to Brown's discretion as to what compliance issues he should raise with them (Tr. 1384).

Newbridge later established the position of trading compliance officer, with responsibility for monitoring the activities of the traders for compliance purposes (Tr. 1937, 2194, 2366; DX 105).[30] Three individuals filled the position during the relevant time period. Richard Bush (Bush) was the trading compliance officer during April and May 2002, and then he resigned (Tr. 2194-95, 2356).[31] Christopher Hite became the trading compliance officer in June 2002, but he left the firm in July 2002 (Tr. 2195; RX 154 at 33). The position was then vacant for the next nine months (Tr. 2195-96). Jose Perich (Perich) was the trading compliance officer from April 2003 until May 2004 (Tr. 1404-05, 1936). The position was then vacant for another two months. Bush rejoined Newbridge as trading compliance officer in early August 2004, and continued to serve in that position through the date of the hearing (Tr. 1083, 1424, 2356).

[30] The witnesses used the terms "trading compliance officer," "trading compliance manager," "director of trading compliance," and "assistant compliance officer for trading" interchangeably (Tr. 968, 1936, 2108, 2356-57). No substantive differences were intended. DX 117 at 198 refers to a log the "trading manager" was required to keep. I infer that this is also a reference to the trading compliance officer.

[31] DX 117 at 32 identifies Bush as the head trader, not the trading compliance officer. DX 118 at 20 and DX 119 at 4 state that Vallejo became the head trader in July 2002. Although these documents conflict with Amico's and Vallejo's testimony, the parties did not explore the reason for the discrepancies.

Bush and Perich both held Series 24 and Series 55 licenses (Tr. 1936, 2068, 2359; DX 105, DX 154). Perich was the trading compliance officer during the Roanoke transactions. Bush was the trading compliance officer during the last ten days of the relevant Concorde transactions.

The OIP alleges that the chief compliance officers and the trading compliance officers were Kantrowitz's "supervisors" (OIP ¶¶ G.43, .45, .46).[32] The only witness to dispute this was Perich. In Perich's view, he did not supervise the traders, but only helped to facilitate their retail trades (Tr. 1942-43). However, Perich's contract required him to ensure that all activities conducted by Newbridge's trading department complied with the applicable securities laws and self-regulatory organization requirements (DX 105 ¶ 3). Perich sat in the same room with the traders and was in a position to observe and listen to them (Tr. 2074). He could bust trades in consultation with Brown (DX 20). Perich initially asserted that he could not discipline traders for misconduct, but then conceded he did so in consultation with Brown (Tr. 2115-16, 2126-28; RX 94). Perich also claimed that he lacked supervisory power and was frequently overruled (Tr. 2109, 2112, 2125, 2130). These aspects of Perich's testimony were overstated and, even if accurate, would not render his position non-supervisory. See Kirk Montgomery, 55 S.E.C. 485, 500-02 (2001). Perich ultimately acknowledged that he was a supervisor (Tr. 2141). The record demonstrates that he was not an effective supervisor (Tr. 1422-24, 1636-37, 1798, 2321-22). The weight of the evidence also shows that Bush was Kantrowitz's supervisor (Tr. 2369-70, 2381, 2422-24, 2431, 2435-36; DX 119 at 26).

2. Amico and Goldstein Did Not Ensure that the Head Trader and the Trading Compliance Officers Understood Their Respective Roles.

Amico and Goldstein believed they delegated to Vallejo responsibility for compliance and supervision relating to the trading activities of the firm (Tr. 869-72, 915-17, 926, 1393-94). In contrast, Vallejo said that Amico and Goldstein never told him that they were delegating compliance authority to him (Tr. 1735-36). Vallejo also testified that he never made compliance decisions relating to the traders (Tr. 1730-32, 1736).

Vallejo testified that he reported to Amico and Goldstein (Tr. 1725-29). Newbridge's organizational chart for January 2003 showed that Vallejo reported to Goldstein, not Amico (DX 140). The organizational chart for August 2003 showed that Vallejo reported to both Amico and Goldstein (DX 140). Breitbart and Brown prepared the charts, and Goldstein conceded that they are accurate (Tr. 1426).

[32] The Commission has held that employees of brokerage firms who have legal or compliance responsibilities do not become "supervisors" for purposes of Sections 15(b)(4)(E) and 15(b)(6) of the Exchange Act solely because they occupy such positions. Rather, determining if a particular person is a "supervisor" depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability, or authority to affect the conduct of the employee whose behavior is at issue. See James J. Pasztor, 54 S.E.C. 398, 407-08 & n.27 (1999); John H. Gutfreund, 51 S.E.C. 93, 112-14 (1992) (settled case, with Exchange Act Section 21(a) report of investigation).

Perich explained that he reported to Vallejo with respect to trading issues and he reported to Brown with respect to retail customers (Tr. 1943-44, 2107, 2197-99). Goldstein believed that Perich reported to Vallejo at first and that Vallejo was responsible for ensuring that Perich carried out his job duties (Tr. 1409-10). Vallejo insisted that Perich reported solely to Brown, not to him (Tr. 1732). The Newbridge organizational chart for August 2003 shows Perich reporting to Vallejo, not Brown (DX 140). Brown did not understand Perich's duties with respect to trading (Tr. 2199).

On September 29, 2003, Breitbart told the NASD that Perich would start to review Vallejo's proprietary trades (DX 113 at 1). Perich maintained that he did not review trades executed by Vallejo (Tr. 2118-19).

The Newbridge organizational chart for December 2004 shows that Bush supervised Vallejo (DX 140). Vallejo also testified that he reported to Bush on compliance issues (Tr. 1734-35). During the Commission's investigation, Goldstein said that Bush reported to Vallejo (Tr. 1424-25). At the hearing, Goldstein testified that Bush supervised Vallejo's proprietary trading, but that, in all other areas, Vallejo supervised Bush (Tr. 1428-29).

Amico and Goldstein testified that they met periodically with Vallejo and the trading compliance officers to discuss the trading desk (Tr. 1232-1234, 1639; RX 51). Vallejo did not remember any regular meetings with Amico and Goldstein from 2001 through 2004 (Tr. 1737). Perich recalled that there were monthly meetings of all supervisors and ad hoc meetings when specific issues arose (Tr. 1945, 2140-42).

3. Alleged Gaps and Real Gaps in the Supervisors' Credentials and Experience

The Division demonstrated that Brown has never held a Series 55 trading license and does not have a background as a trader (Tr. 2175-76). This evidence is outweighed by Respondents' showing that Brown's assistant compliance officers, Michel Tsaparlis and David Wells (Wells), both had Series 24 and 55 licenses (DX 112 at 4-5, DX 119 at 25-26). Respondents also demonstrated that the Division's expert witnesses on supervisory issues prepares trading policies and procedures and regularly advises his consulting clients on trading issues, even though he also does not hold a Series 55 license and has never worked as a trader or supervised a trading or market making operation (Tr. 2490-91; DX 123). No regulation requires the chief compliance officer of a brokerage firm to hold a Series 55 license.

Brown explained to Amico and Goldstein when he was hired that he did not have trading experience and that he could not supervise a trading department (Tr. 898, 2176-77). Before coming to Newbridge, Brown did not have any compliance experience with respect to the liquidation of penny stocks (Tr. 2179-80). When Bush joined Newbridge, he had limited experience supervising traders and no experience with respect to trading compliance (Tr. 2359-65; DX 154).

The Division also established that Vallejo was very busy handling the firm's order flow (Tr. 1703, 1714). Vallejo executed 500 to 600 trades on an average day, and up to 1,000 trades

on a busy day (Tr. 1715). The time Vallejo devoted to these responsibilities necessarily limited the time he could devote to supervising others at the trading desk.

4. The "Open Door" Policy

Amico and Goldstein both claimed to have an "open door" policy, whereby subordinates could bring issues to their attention "and not feel bad or bashful about it" (Tr. 887-88, 1364, 1615). Other evidence establishes that Amico's and Goldstein's approach to supervision was more accurately characterized as a policy of "the buck stops with you" (Tr. 890-91, 1361-63, 1386-88). Goldstein repeatedly told subordinates to solve problems on their own, without involving him (Tr. 1481-83) ("[I was t]rying to teach [operations department employee Mark O'Byrne] how to communicate . . . Mark had a fear of going into [the] trading [department]") (referring to DX 142); (Tr. 1633) ("It was another test to see if they could handle some things on their own") (referring to RX 98-RX 101). See infra note 36. I find as a fact that Amico's and Goldstein's actual approach to supervision was far closer to "the buck stops with you" than it was to an "open door."

B. Newbridge Hires Kantrowitz.

Vallejo recruited Kantrowitz, whom he had known for several years (Tr. 25-26, 1704-05, 1769). When Newbridge applied to register Kantrowitz as its associated person, the Division of Securities and Finance of the State of Florida objected, based on Kantrowitz's disciplinary record (DX 17).

1. The Registration Agreement with the State of Florida

The Market Surveillance Committee (Committee) of the NASD had brought a disciplinary action against Kantrowitz in July 1995 (DX 4 at 1). The complaint in that proceeding alleged that Kantrowitz arranged to sell 29,000 shares of stock to a customer at the prevailing bid price instead of the offering price, so that the customer could then sell the stock at the offering price and obtain the benefit of the spread (DX 4 at 3). According to the NASD's complaint, Kantrowitz did so as a means of paying the customer $6,000 (DX 4 at 3). The NASD's complaint further alleged that Kantrowitz had arranged this trade as a reward for the customer's business, in violation of the NASD's Rules of Fair Practice (DX 4 at 3).

Kantrowitz settled the NASD disciplinary action in May 1996, without admitting or denying the allegations of the complaint (DX 4). In its Settlement Order, the Committee specifically stated: "[I]t does not appear to us that Kantrowitz had any intent to influence the market price" for the stock in question (DX 4 at 4). The Committee also found: "[A]t worst, the record demonstrates an indifference by Kantrowitz to the effect his three arranged trades might have had in the market" (DX 4 at 4). The Committee censured Kantrowitz, fined him $10,000, required him to pay restitution of $3,625, and suspended him for 120 days from associating with a member firm in any capacity (DX 4 at 4). The Committee also required Kantrowitz to re-qualify by taking and passing the Series 7 examination or an equivalent examination following the expiration of his suspension (DX 4 at 4).

Based on this 1996 disciplinary action, the State of Florida believed that sufficient grounds existed to restrict or deny Kantrowitz's application for association with Newbridge. However, the State of Florida was willing to approve the application if Newbridge and Kantrowitz would agree to certain restrictions for a period of seventeen months (DX 17). As here relevant, Kantrowitz pledged to comply with all state and federal securities laws and all supervisory procedures at Newbridge (DX 17). For its part, Newbridge promised to enforce all restrictions placed upon Kantrowitz and "to immediately report to the [State of Florida] any violation of any of the restrictions imposed by this Agreement" (DX 17).

Phelps, Newbridge's compliance officer, signed the registration agreement, and Vallejo assumed the responsibility for strictly supervising Kantrowitz (Tr. 1772; DX 17). Kantrowitz was subject to the registration agreement for more than twenty-one months from October 4, 2001, through July 22, 2003 (Tr. 35; DX 17).

2. Kantrowitz's Supervisors Purportedly Did Not Know What the Registration Agreement Required.

Amico asserted that he was not involved in hiring Kantrowitz (Tr. 953-55, 1141). He also represented that he did not know at the time Newbridge hired Kantrowitz that Kantrowitz had been the subject of an NASD disciplinary action (Tr. 953-54). I find Amico's testimony on these points to be incredible. Amico's duties included hiring registered representatives (DX 109, Tab 4, Appx. A). In fact, Amico signed Kantrowitz's employment contract on behalf of Newbridge (DX 16). The employment contract recited that Kantrowitz had disclosed in writing to Newbridge any prior suspension by a self-regulatory organization (DX 16 ¶ 2.e). Amico testified that he became aware that Kantrowitz was subject to heightened supervision, but he did not know why (Tr. 954-55, 957). Amico never asked to see the registration agreement, but he knew generally its terms (Tr. 958-59).

Despite his representation to the NASD that he was responsible for hiring registered representatives, Goldstein claimed that he was only involved in setting Kantrowitz's compensation (Tr. 1555; DX 109, Tab 4, Appx. A). Goldstein did not then know that Kantrowitz had been the subject of an NASD disciplinary action (Tr. 1450). I find this testimony dubious because Newbridge was a small firm at the time, and Phelps was personally close to Goldstein (Tr. 1371). I do not believe Phelps would have concealed a matter of this importance from Goldstein, given Goldstein's purported "open door" policy. Goldstein never saw the 1996 NASD Settlement Order or the 2001 registration agreement (Tr. 1449-50). He never knew the terms of Newbridge's obligations under the agreement (Tr. 1451-52). Goldstein purportedly only learned of the prior disciplinary proceeding and the registration agreement around the time Vallejo requested the State of Florida to release Kantrowitz from the agreement (Tr. 1449-51).

Breitbart only learned of the fact that Kantrowitz was subject to heightened supervision around the time that Kantrowitz requested to be released from the registration agreement (Tr. 2679). Brown became aware of the fact that Kantrowitz was under heightened supervision when he was appointed chief compliance officer in April 2002 (Tr. 2207-09). However, he could not recall if he knew the terms of the registration agreement, or if he had any conversations with Vallejo as to whether Kantrowitz ever violated the agreement (Tr. 2216-17). Brown assumed

that he was responsible for reporting any violations of the registration agreement to the State of Florida (Tr. 2217-18).

There is no evidence that Newbridge's trading compliance officers monitored the registration agreement. Bush did not recall if he knew about the registration agreement when he was the trading compliance officer in 2002 (Tr. 2368). He also did not recall if he had any role with respect to the registration agreement, or if he discussed Kantrowitz's strict supervision with anyone (Tr. 2369). Perich eventually learned that Newbridge had signed a registration agreement with the State of Florida (Tr. 1964, 1970). He never saw the registration agreement or discussed it with anyone, either (Tr. 1963-64, 1970).

Respondents suggest that it is not surprising that the witnesses' recollections about the registration agreement are so indefinite, because the witnesses testified seven years after the agreement was signed and five years after it lapsed. I draw a different inference. If Newbridge had appropriate written supervisory procedures in place when it hired Kantrowitz, the parties could have cited Newbridge's contemporaneous records, and it would have been unnecessary to rely on the witnesses' recollections.[33]

3. Strict Supervision under the Registration Agreement Proves Ineffective.

During the period of strict supervision, Vallejo sat close to Kantrowitz in the trading room, overheard Kantrowitz's telephone conversations, and reviewed Kantrowitz's daily trade blotters (Tr. 38-40, 413-14, 1708-10, 1712-14, 1747-48). Vallejo also had several computer screens that enabled him to monitor Kantrowitz's trading activities in real time (Tr. 109-10, 1719-21, 1850-52, 1855). Vallejo could not recall if anyone at Newbridge instructed him as to how he should supervise Kantrowitz under the terms of the registration agreement (Tr. 1772). Nor could Vallejo recall if he asked any questions as to how he should enforce the agreement (Tr. 1773). In fact, Vallejo supervised Kantrowitz in the same manner as he supervised all the other traders (Tr. 1723-24, 1772).

[33] It is unclear why the State of Florida, and not Newbridge itself, was the first to question Kantrowitz's fitness. In 2001, Newbridge's policies and procedures required the designated principal to supervise the hiring of a registered representative, to investigate the candidate, and to make written notes of the investigation in the candidate's file (DX 109, Tab 4, § 2). By 2002, Newbridge's policies and procedures required that all candidates, including traders, undergo a pre-hire review by senior management (DX 117 at 48). The Senior Management Hiring Committee consisted of the firm's chief executive officer, president, director of compliance, and the hiring manager (DX 117 at 48). The committee's approval form required each member to sign with "approval" or "disapproval" for each candidate (DX 117 at 53). If special supervision of a prospective hire was appropriate, the compliance department had to prepare a written memorandum, either explaining why the firm's existing supervisory procedures were adequate to address the supervision of the candidate, or outlining the additional supervision to be implemented (including how the supervision should be documented) (DX 117 at 54-55).

Vallejo's daily trade blotter review was not an effective supervisory technique while the registration agreement was in effect. On January 16, 2003, Vallejo was behind on reviewing 306 trades by Kantrowitz (DX 31). On March 3, 2003, the compliance department reminded Vallejo that he was behind on reviewing 234 trades (DX 32). On May 7, 2003, Vallejo was behind on reviewing 191 trades, and on May 9, 2003, he was behind on reviewing 260 trades (DX 33, DX 34). On May 23, 2003, the backlog was up to 300 trades; on May 28, 2003, it was up to 400 trades; and on June 23, 2003, Vallejo was behind on reviewing 533 trades (DX 35-DX 37).

Some evidence suggests that a backlog of 191 to 306 blotters represents only one or two days of trading (Tr. 1750, 1756, 2113). However, the weight of the evidence demonstrates that the compliance department had to prompt Vallejo because he was reviewing the trade blotters once every two weeks, instead of daily as required (DX 32, DX 117 at 144).

Kantrowitz did not recall ever having a discussion with Vallejo about his trade blotters while he was subject to the registration agreement (Tr. 39-40). Amico and Goldstein were aware that Vallejo had fallen behind in reviewing Kantrowitz's trade blotters as of January 16, 2003 (Tr. 1400-02; DX 31). Goldstein claimed that he followed up on the problem immediately (Tr. 1635). However, the impact of his intervention was dubious, because Vallejo's backlog continued to grow for more than another six months (DX 32-DX 38). Brown notified Goldstein that the problem with Vallejo was ongoing as of July 29, 2003 (Tr. 1402-03, 1414-16, 1420; DX 38). Goldstein and Vallejo spoke about the issue (Tr. 1749). After Kantrowitz came off strict supervision, Vallejo did not want to review the trade blotters anymore (Tr. 1949-50). At that juncture, the supervisory assignment shifted to Perich and others (Tr. 1949-50; DX 48, DX 78).[34]

On February 19, 2003, Jodi Weissman (Weissman), a junior compliance officer, informed Amico, Goldstein, Brown, Vallejo, and Breitbart that Kantrowitz had sold 1,000 shares of a restricted security on behalf of a customer (DX 18). Weissman had expertise in Rule 144 issues (Tr. 2850). She asked for guidance on how to handle the matter. Brown replied that the trade violated Securities Act Rule 144 and should be busted (Tr. 1006-10, 1455-56; DX 18). The record does not disclose the specific nature of the problem Weissman detected. Vallejo and Brown did not recall this issue or how they handled it (Tr. 1776-77, 2244-47). Amico and Goldstein did not know how Newbridge resolved the situation or whether Newbridge reported it to the State of Florida (Tr. 1011, 1457). I consider this episode as evidence that Kantrowitz proved to be a supervisory nightmare for Brown while the registration agreement was in effect (Tr. 2270). Given the inconclusive state of the record, I do not consider it as evidence of a supervisory failure by Amico, Goldstein, Brown, or anyone else.

In late June 2003, Brown became concerned about trading in Blue Moon Group, Inc. (Blue Moon), a penny stock (Tr. 2265-66; DX 27). He found one individual attempting to pump Blue Moon stock and engaging in improper sales tactics, and he found another individual, the

[34] Amico and Goldstein assert that there was no problem with the timely review of trade blotters after July 2003, and contend that this is evidence of proper supervision on their part. The argument misses the point. The relevant issue is whether the daily trade blotter review was effective while Kantrowitz was subject to the registration agreement. It was not.

president of Blue Moon, trying to hype the stock (DX 27, DX 136). Blue Moon's president was a customer of Kantrowitz (Tr. 1791, 2266, 2323). Brown prepared a memorandum asking Kantrowitz several questions about his relationship with Blue Moon and its president (Tr. 2266, 2323-24).

Kantrowitz refused to provide the information to Brown, ostensibly on the grounds that he was a trader, not a broker (DX 27, DX 136).[35] Brown then restricted Kantrowitz from trading Blue Moon until he got answers to his questions (Tr. 2266-67). Nonetheless, Kantrowitz continued to trade the stock (Tr. 1029-30; DX 27, DX 136).

On July 3, 2003, Brown told Perich to bust the trades, but Perich stalled. According to Perich (DX 20):

> This is going to [be] another blow up. He's yelling this is his biggest customer who [brings] in a lot of accounts to the firm. I bet you anything that we will be shot [down]. Can we hold off until Monday?

On July 11, 2003, eight days later, Brown asked Goldstein for help (Tr. 2272-73; DX 136). Goldstein forwarded Brown's e-mail message to Vallejo, stating: "[T]ell me what the scoop is [as] soon as you see this message so I can [quell] it" (Tr. 1509-10; DX 27). Vallejo did not recall the episode, or any discussions about the e-mail (Tr. 1790-91).

Brown did not hear from Goldstein for another ten days, and Kantrowitz continued to execute trades in Blue Moon (Tr. 1030-31, 1512-14, 2271-73; DX 136). When Brown asked Goldstein for help a second time, he also sent a copy of his e-mail to Amico and Breitbart (Tr. 1028-30; DX 136). On July 21, 2003, Goldstein responded: "[I] go with whatever you say" (Tr. 1512, 1514, 2272-73; DX 136).[36] Finally, after three weeks of delay, Kantrowitz gave Brown the information he wanted about Blue Moon (Tr. 2270, 2273-74).

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[35] Newbridge's policies and procedures prohibited traders from handling customer accounts. Any exception to the policy had to be referred in writing to the compliance department (DX 117 at 167). There is no evidence that Newbridge followed this policy, even though Kantrowitz handled approximately 200 customer accounts (DX 115 at 3; DX 116 at 6-7).

Respondents' expert witness dismissed this as a matter of form over substance, because Kantrowitz's supervisors knew he was servicing retail accounts (RX 154 at 32). I view the issue differently: at the time, none of Kantrowitz's supervisors had the spine to confront him and insist that he follow the firm's policies and procedures. Amico and Goldstein did not take away Kantrowitz's retail customers for another two years (Tr. 1293, 2671).

[36] Goldstein's slow response to Brown demonstrates that his "open door" was not available when Brown needed it. When Brown "passed the buck" to Goldstein, Goldstein ignored it for ten days. When Brown asked for help a second time, Goldstein "passed the buck" right back to Brown. Goldstein dismissed the episode as a personality conflict between Brown and Kantrowitz (Tr. 1509). At the hearing, Goldstein still viewed Brown, not Kantrowitz, as the root of the Blue Moon problem (Tr. 1511, 1514).

Brown could not remember if he issued a letter of admonition to Kantrowitz over the Blue Moon incident (Tr. 2274). Amico did not know if Newbridge reported the incident to the State of Florida (Tr. 1032). Kantrowitz came off strict supervision the next day.

Kantrowitz continued to create compliance problems after the period of strict supervision ended. Under Exchange Act Rule 15g-2, a broker or dealer must furnish any customer trading penny stocks a disclosure document and must obtain a signed and dated acknowledgement of receipt (Tr. 2313; DX 97, Ex. B, DX 117 at 155). Under Newbridge policy, any customer submitting an order to purchase a penny stock was also required to provide the firm with a signed and dated non-solicitation letter (Tr. 2314; DX 97, Ex. C, DX 117 at 154).

During August and September 2003, Brown and Perich had repeated difficulty getting Kantrowitz to submit the disclosure documents and the non-solicitation letters (Tr. 1988-93; DX 138, DX 145). Brown ultimately fined Kantrowitz $200 (DX 145). Amico and Goldstein knew that Brown was having a problem with Kantrowitz (Tr. 1060-63, 1522-23; DX 138). Amico did not know how the problem was resolved (Tr. 1063). Goldstein did not remember discussing the problem with anyone and he did not take any action (Tr. 1523).

4. Supervisors At All Levels Grant Kantrowitz Frequent Exceptions to Newbridge's Policies and Procedures.

Under Newbridge policy, stock that the firm received in certificate form could not be sold until Newbridge's clearing broker confirmed that the certificate had "cleared legal" and was "in street name" (Tr. 75-76, 80, 1597; DX 98, DX 135, memoranda dated Nov. 4, 2002, and June 26, 2003). Brown was responsible for policing the policy, with assistance from Vallejo and Perich, and they could grant exceptions to the policy (Tr. 1528-29, 1598-99).

By June 2003, Kantrowitz had violated the policy several times by selling stock before compliance officials could confirm that the underlying certificates were in street name (Tr. 1781, 1971-75, 2233-34; DX 25, DX 135). In another instance, Kantrowitz had requested an exception to the policy (DX 134). Amico and Goldstein were aware of Brown's frustration with Kantrowitz (DX 134, DX 135).

In a June 26, 2003, memorandum, Brown announced that, for the future, he would evaluate on a case-by-case basis Kantrowitz's requests to engage in sales of stock where the certificates were not in street name (DX 135). Amico and Goldstein did not become involved in the case-by-case grant of exceptions for early sales, because they concluded that several supervisors were monitoring the situation (Tr. 1149-51, 1158, 1603-04).

Over the next several months, Brown, Vallejo, and Perich freely granted Kantrowitz exceptions (Tr. 164, 181-83, 2145; DX 131). Between July 2003 and May 2004, Kantrowitz's log book shows that Vallejo or Perich granted scores of exceptions (DX 131). In other instances, Brown, Vallejo, and Perich granted verbal approvals for exceptions (Tr. 162, 164, 166, 182, 263).

Newbridge policy also provided that customer requests for payment prior to the settlement date on a sale had to be approved by a designated principal (DX 117 at 92). Proceeds from the sale of penny stock could not be paid out of an account until ninety days after the penny stock certificate had been deposited with the firm (DX 117 at 156).

Beginning in June 2003, Amico and Goldstein approved several dozen requests from Kantrowitz to wire funds to customers before the proceeds of the transactions had settled in the customers' accounts (Tr. 1516-18, 1602, 2855-63; DX 19, DX 23, DX 26, DX 28, DX 131). In each instance, Kantrowitz agreed to indemnify Newbridge from his anticipated commission income if a problem developed (Tr. 144-45, 1304, 1603). The Division demonstrated that many of these wire transfers involved sales of penny stock and that the relevant certificates were not yet in street name (DX 131). It also demonstrated that the proceeds of penny stock sales were approved for payment sooner than ninety days after the deposit of the relevant certificates (DX 115 at 3). Because Amico or Goldstein had to approve all wire transfers for proceeds from stock that had not yet been cleared into street name, I infer that they were made aware of the five separate occasions during November and December 2003 that Kantrowitz sought to wire the proceeds of Roanoke sales to Bojadzijev. If Amico and Goldstein were aware that Kantrowitz was requesting to wire funds under those circumstances, then they were also aware that Kantrowitz had sold stock that was not yet in street name. Amico and Goldstein effectively approved such sales after the fact when they authorized the wires to go out.

The Division urges me to infer that Kantrowitz's supervisors granted these requests because Kantrowitz was a big revenue producer and a prima donna, and they wanted to keep him happy and quiet. There is some truth to this, but it is overstated. Brown did reprimand Kantrowitz once (Tr. 2310-11; RX 153). Kantrowitz also incurred three or four fines in 2003 and 2004 (Tr. 2872-73, 2879-83). Perich acknowledged that Kantrowitz did not receive any special favors (Tr. 2140).

Kantrowitz typically spoke in a loud voice (Tr. 55, 1709, 1713, 2131). When he did not get his way, his custom was to speak even louder (Tr. 1978, 2267-68). According to Perich, if a supervisor told Kantrowitz "no," Kantrowitz often went over that official's head until he found a higher-level supervisor who gave him the response he wanted (Tr. 1979-80, 1983, 2112, 2130). Kantrowitz's instant messages support Perich's testimony (DX 65, Dec. 31, 2003, at 14:04:18 ("final say isn't even up to [Jose]")). Amico and Goldstein sided with Kantrowitz often enough in these disputes that two other compliance officials (i.e., Brown and Alan Greenstein) were betting with each other as to whether Amico and Goldstein would overrule them again (DX 24). I infer that this is the atmosphere that Goldstein had in mind when he described Newbridge as a workplace where many employees simply did not get along with each other (Tr. 1453-55) ("There [were] a lot of personality conflicts between a lot of different people at Newbridge. . . . As a CEO, . . . I was more of a psychiatrist than anything else and still am.").

C. Regulators Alert Amico and Goldstein to Several Inadequacies in Newbridge's Supervisory Systems.

Amico and Goldstein learned of several inadequacies in Newbridge's supervisory systems through two NASD disciplinary actions and three regulatory examinations between July 2002 and December 2003.[37]

1. The NASD brought a disciplinary action against Newbridge, Goldstein, and Phelps, alleging failure to supervise registered representatives with a view to preventing high pressure sales tactics, unauthorized trading, misrepresentations and omissions, and unwarranted price projections during 2001 (DX 2, DX 114). The disciplinary action also alleged that Newbridge failed to record the entry and execution times on 144 order tickets during March 2002. The respondents offered to settle in May 2003, without admitting or denying the charges, and the NASD accepted the settlement in October 2003 (DX 2, DX 114). The problem with the 144 order tickets was fixed (Tr. 1398-1400). Accordingly, I have given greater weight to the supervisory problems.

The NASD censured Newbridge and fined it $60,000 (DX 114 at 4). In addition, Newbridge promised to retain an outside consultant to make recommendations concerning the firm's current policies and procedures relating to its sales practices and its supervisory systems (DX 114 at 4). Newbridge also agreed to adopt and implement the outside consultant's recommendations. The NASD fined Goldstein $10,000 and Phelps $5,000 (DX 114 at 4-5). It suspended both men from association with any NASD member for thirty days (Tr. 1343; DX 2 at 4-5, DX 114 at 4-5).[38]

2. On January 15, 2004, the NASD censured and fined Newbridge $7,500 for failing to submit certain automated confirmation transaction service sales reports within ninety seconds after execution, based on an examination for the period September 1 through December 31, 2002 (Tr. 1073-74, 1582-84; DX 3).

3. The NASD staff examined Newbridge during 2003. On September 5, 2003, the NASD staff conducted an exit conference with Newbridge and distributed a memorandum noting several areas of concern (Tr. 1108-09; RX 24). Among other things, the NASD staff determined that Vallejo had been trading the firm's proprietary account without supervision (RX 24 at 1). The NASD staff also found that Newbridge had failed to develop an adequate supervisory system to prevent and detect insider trading (RX 24 at 2).

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[37] The Division submitted evidence of several other disciplinary actions that Newbridge and its employees settled between 2005 and 2008. Disciplinary actions that post-date the Roanoke and Concorde transactions could not have put Amico or Goldstein on notice of supervisory deficiencies in time to prevent or detect Kantrowitz's misconduct during 2003 and 2004. I address these other disciplinary actions in connection with sanctions. See infra pp. 65-66.

[38] Goldstein served his suspension between December 17, 2003, and January 16, 2004 (Tr. 1578-81, 1662-63).

Amico and Goldstein did not attend the exit conference, but Amico reviewed the firm's draft response (Tr. 1110; DX 112; RX 24). On September 29, 2003, Newbridge replied in writing to the NASD staff (Tr. 1109; DX 113). The response letter stated that Perich would begin to monitor Vallejo's proprietary trading on behalf of the firm (Tr. 1111; DX 113 at 1). But see supra p. 26. Newbridge's letter also stated that the firm was reviewing its supervisory system for preventing and detecting insider trading (DX 113 at 3).

4. The staff of the Commission's Southeast Regional Office examined Newbridge in July 2002. The staff discussed the results with Newbridge at an exit interview on July 12, 2002, and in an exit telephone conference on October 11, 2002. The staff then sent Amico a deficiency letter, identifying several violations of the Exchange Act, Exchange Act rules, and NASD rules, on October 15, 2002 (DX 110) (2002 deficiency letter).

Among other things, the 2002 deficiency letter identified fifteen customer accounts, including two accounts belonging to customers of Kantrowitz, with questionable transactions in low-priced securities (Tr. 1099-1102, 1465; DX 110 at 3, Item 5, and Appx. B). At the time of the transactions, Kantrowitz was subject to the registration agreement with the State of Florida (Tr. 1465). The 2002 deficiency letter also determined that Newbridge's written supervisory procedures failed adequately to address the receipt and delivery of large blocks of low-priced securities (Tr. 1104-05; DX 110 at 4-5, Item 9). The Commission's staff specifically informed Amico that Newbridge's "procedures should address the supervisory review of these types of activities for possible manipulative devices such as: unregistered distribution of securities, insider trading, and money laundering" (DX 110 at 4-5).

Amico and Goldstein participated in an internal review process to investigate the deficiencies raised by the Commission's staff (Tr. 1159-60, 1464, 1468, 2604-08). Breitbart drafted Newbridge's response letter, and Amico signed it on November 26, 2002 (Tr. 1107, 1160-61; DX 111). Vallejo never saw the 2002 deficiency letter or Newbridge's response letter, even though many of the questionable transactions involved the trading desk, occurred while Kantrowitz was under Vallejo's strict supervision, and implicated two Kantrowitz customers (Tr. 1782, 1784-85). With respect to Items 5 and 9 of the 2002 deficiency letter, Amico represented that Newbridge had adopted a new system of review. In the future, upon receipt of stock certificates and before any funds were wired out of an account, registered representatives would be required to complete, and Newbridge's compliance department would be required to receive, a questionnaire setting forth the details and business reasons for each deposit and liquidation of securities (DX 111 at 5, 8, referring to DX 97).

5. The staff of the Commission's Southeast Regional Office conducted a second examination of Newbridge's main office during 2003 (Tr. 1113). On December 31, 2003, the Commission's staff sent Amico a second deficiency letter, noting several possible violations of the Securities Act, the Exchange Act, the Commission's implementing rules, and NASD rules (DX 115) (2003 deficiency letter). The Commission's staff also discussed these matters by telephone with Amico and Breitbart that same day (Tr. 1113-14; DX 115 at 1).

The 2003 deficiency letter identified several possible unregistered distributions of securities, based upon a review of customer activity for the period January 1, 2003, through July 31, 2003 (DX 115 at 1-2, Item 1). It expressed concerns about the accounts of fifteen customers, six of whom were customers of Kantrowitz (Tr. 1114-17; DX 115 at 1 and Attachment). The 2003 deficiency letter specifically noted that Newbridge had failed to conduct adequate inquiries to determine if the activity in these accounts complied with Section 5 of the Securities Act (Tr. 1117-18; DX 115 at 1-2).

The 2003 deficiency letter also found that Newbridge had failed to establish and implement adequate procedures and to take reasonable steps to prevent violations of the federal securities laws, including Section 5 of the Securities Act (Tr. 1119; DX 115 at 2, Item 2). It further noted that Newbridge maintained accounts for consultants to penny stock issuers and promoters who had previously been subject to Commission enforcement actions (Tr. 1119-20; DX 115 at 2). The staff explained that the "activity in these accounts should trigger 'red flags' and alert heightened supervisory reviews" (Tr. 1119; DX 115 at 2).

The 2003 deficiency letter next found that "Newbridge's supervisory system and procedures are inadequate, in that they fail to address these risk factors" (Tr. 1120; DX 115 at 2-3). Among other things, the staff stated that Newbridge's procedures "fail to address the level of supervision needed for the type of accounts that it services and business conducted; do not include steps instructing how to determine the source of the stock received in customer accounts, or how to conduct an adequate inquiry; and do not require additional review of accounts that receive, deliver, transfer, or sell large blocks of low-priced securities to prevent manipulative activities and securities law violations" (Tr. 1120-21; DX 115 at 2-3).

The staff also determined that Newbridge had failed to follow its written policy requiring that proceeds from penny stock sales could not be paid out within ninety days from the dates of the certificates' deposit (DX 115 at 3; DX 117 at 156).

The 2003 deficiency letter further noted that Kantrowitz was the registered representative on over 200 accounts (DX 115 at 3). Under Newbridge's procedures, traders, such as Kantrowitz, were prohibited from handling customer accounts, and any exception to the policy must be referred in writing to the compliance department (DX 117 at 167). The staff found no evidence that Newbridge adhered to this policy (DX 115 at 3). The staff also concluded that Newbridge had failed to provide heightened supervision to Kantrowitz, who was under the registration agreement with the State of Florida when some of the questionable account activities occurred (DX 115 at 3). The staff quoted Vallejo as stating "that he does not get involved in reviewing accounts that receive or deliver stock unless there is a problem" (DX 115 at 3).

The 2003 deficiency letter stated that "[t]his is the second time the staff has discovered supervisory deficiencies at Newbridge" and noted that "Newbridge failed to demonstrate that it took appropriate action once the activity in [specific] accounts was identified by the staff, and failed to implement a supervisory system reasonably designed to prevent unregistered distributions" (DX 115 at 3). It added that, "[a]lthough you stated in your response to the [2002 deficiency] letter that you had taken steps to address the deficiencies identified by the staff, it appears that they continue. Your continued failure to take corrective action will be construed as

willful disregard for compliance with the federal securities laws" (Tr. 1122; DX 115 at 4). The 2003 deficiency letter sought immediate corrective action (DX 115 at 4).

Newbridge replied to the 2003 deficiency letter on January 29, 2004 (Tr. 1122-23; DX 116). It dismissed as "unfounded" the staff's concern that it may have acted as an underwriter in connection with the offer and sale of unregistered securities (DX 116 at 1-4). It acknowledged that it had permitted Kantrowitz to be the broker of record on approximately 200 customer accounts, although the exception to the firm's written procedures had not been reduced to writing (DX 116 at 6-7). Newbridge eliminated its written policy requiring the proceeds of penny stock sales to be held for ninety days (DX 116 at 7).

Newbridge also pledged to take several steps to improve the firm's supervision of its penny stock activity (DX 116 at 5-7). It explained that it would create a new position, Designated Securities Compliance Officer (DSCO), and anticipated filling the position by February 1, 2004 (Tr. 1123; DX 116 at 5). But see infra note 45. In addition, Newbridge represented that it was currently undertaking a comprehensive review and revision of its written supervisory procedures to address the matters raised in the 2003 deficiency letter (Tr. 1123-24; DX 116 at 7).

D. Newbridge Did Not Develop Reasonable Systems to Implement Its Supervisory Policies and Procedures.

Written compliance guidelines generally set forth the applicable rules and describe prohibited practices (DX 125). See Notice to Members 98-96, NASD Elaborates on Member Firms' Supervision Responsibilities for Trade Reporting and Market-Making Activities (December 1998). Written supervisory procedures describe the actual supervisory system established by a firm to achieve compliance (DX 125). Id. Written compliance guidelines, in and of themselves, do not constitute either an adequate supervisory system or adequate written supervisory procedures. Id. To be adequate, a firm's written supervisory procedures must identify: (1) the individual responsible for supervision; (2) the supervisory steps and reviews to be undertaken by that individual; (3) the frequency of such reviews; and (4) the manner in which the reviews are to be documented. Id.

Newbridge issued a Compliance Policies and Procedures Manual in 2002 (DX 117) (2002 Manual). The 2002 Manual replaced the written supervisory procedures attached to Newbridge's February 2001 letter to the NASD (DX 109, Tab 4). The 2002 Manual remained in effect until 2004, and was supplemented from time to time with compliance memoranda on specific topics (Tr. 912-13). Brown, Breitbart, and Phelps took the lead in drafting the 2002 Manual (Tr. 1382-84, 2180-85, 2287-89). Amico, who had a background in developing compliance and supervisory procedures before owning Newbridge, participated in drafting and review sessions (Tr. 847-48, 914-15, 935).

There are substantive differences between the February 2001 written supervisory procedures relating to trading and the corresponding section of the 2002 Manual (DX 109, Tab 4, DX 117 at 165-207). However, the record is silent as to who made these changes and why. Brown did not contribute to the section of the 2002 Manual that related to over-the-counter

equity trading and market making because he did not have the requisite experience or expertise (Tr. 2182-83, 2185-86, 2188, 2333-34; DX 117 at 165-207). Brown asked Vallejo to look at the trading and market making section of the 2002 Manual (Tr. 1738-39, 2187-88). According to Brown, the trading compliance officer was responsible for reviewing the 2002 Manual and considering Vallejo's comments (Tr. 2192). Vallejo did not recall what he was asked and did not write any of the text (Tr. 1738-39). Bush was the trading compliance officer in April and May 2002, but he was "in the evaluation stage" when he left the firm (Tr. 904, 2194-95, 2356, 2369). The parties did not question Bush about his contributions, if any, to the 2002 Manual.

1. Supervisory Systems and Written Supervisory Procedures to Review Incoming Correspondence

The NASD provided guidance to its members in January 1998 about how to implement supervisory procedures for reviewing correspondence with the public (DX 126). Newbridge's 2002 Manual provided that incoming correspondence, including incoming facsimile correspondence, was to be reviewed by a designated reviewer appointed by the branch or department principal (DX 117 at 70). The 2002 Manual did not describe the supervisory steps to be undertaken or the manner in which to document them.

OIP ¶ G.42 alleges that Bojadzijev sent Kantrowitz a "suspect letter" on November 28, 2003. It further alleges that no one at Newbridge ever reviewed the letter. The letter stated that Bojadzijev would be receiving his Roanoke shares in a series of large blocks that would not trigger the "10% rule" (DX 44). I infer that this was a reference to the reporting requirements in Section 16(a) of the Exchange Act and Exchange Act Rule 16a-3.

On its face, and without a facsimile transmission cover sheet, the letter from Roanoke to Bojadzijev does not look like "incoming correspondence" to Newbridge (DX 44). However, Bojadzijev sent this letter to Newbridge at Kantrowitz's request (Tr. 503-04). On that basis, I find that the letter was "incoming correspondence," subject to Newbridge's correspondence review procedures.

When Kantrowitz received the letter, he told Bojadzijev that he would show it to "management," by which he meant the compliance department (Tr. 138-39; DX 44, DX 65, Nov. 28, 2003, at 9:30:03). In this instance, Kantrowitz dealt with Vallejo, or Perich, or Brown, or "all of them" (Tr. 145-46).

Perich saw the letter and acknowledged receipt (Tr. 2041-43; DX 131, Nov. 28, 2003, entry ("have letter from company")). He also claimed not to know why Roanoke sent it. I find this testimony dubious, at best. Perich could not recall discussing the letter with anyone, although he might have spoken about it with Brown or Breitbart (Tr. 2043). Perich explained that reviewing correspondence was not one of his "direct duties," that it was never put in his job description, and that he did not do it on a regular basis (Tr. 1945-46). This testimony was dubious, as well. In any event, there is no evidence that Perich considered whether delivery of

Roanoke stock to Bojadzijev in large blocks might have been a device to avoid the reporting requirements of Section 16(a) of the Exchange Act and Exchange Act Rule 16a-3.[39]

I find that the written review procedures were inadequate and that Perich's supervisory review of the letter was ineffective as a result.

2. Supervisory Systems and Written Supervisory Procedures to Prevent and Detect Unregistered Distributions

The stock certificate deposit questionnaire was the centerpiece of Newbridge's enhanced due diligence effort, as outlined in Amico's response to the 2002 deficiency letter from the SEC staff (Tr. 1469-70; DX 97). Brown revised the questionnaire and memorialized the firm's certificate-processing procedures in November 2003 (Tr. 996-1000; DX 98, DX 99, DX 152). The revised questionnaire was in use when Kantrowitz liquidated 233 million shares of Roanoke for Bojadzijev.

During November and December 2003, Newbridge had no effective supervisory systems or written supervisory procedures to ensure that registered representatives completed the questionnaires accurately or on a timely basis. The process for completing the questionnaire permitted registered representatives to obtain information simply by asking customers (Tr. 66, 1997-98). Registered representatives were not required to contact the issuers of securities, and customers were only requested to contact the issuers if the certificates bore restrictive legends. Supporting documents, such as Forms S-8 or consulting agreements, were only occasionally collected (Tr. 1999-2000). The completed questionnaires did not undergo a meaningful review, either. Other than confirming with transfer agents and the clearing broker that the relevant stocks were in street name, Newbridge had no affirmative supervisory review procedures in place (Tr. 2846-54; DX 99).

Brown insisted that he had no supervisory responsibility for ensuring that the questionnaires were completed; instead, he believed that Vallejo and the trading compliance officer had this supervisory authority (Tr. 2242-44). Vallejo informed the Commission's staff in 2003 that he did not get involved in reviewing accounts that received or delivered stock unless there was a problem (DX 115 at 3). He also testified that he had no role with respect to compliance at the trading desk (Tr. 1730-32, 1736). Perich claimed that he did not have any responsibility for reviewing the contents of the questionnaires, but merely ensured that they were completed (Tr. 1998-99, 2001). I find this aspect of Perich's testimony incredible, as well. Perich purportedly did not recall why Brown had requested that the questionnaires be completed, and he did not see the questionnaires after they were completed (Tr. 2063).

[39] There is no proof in this proceeding that Bojadzijev was attempting to avoid the reporting requirements of the Exchange Act. See supra p. 13. There is only the prospect that he might have been doing so. Cf. SEC v. Freiberg, 2007 U.S. Dist. LEXIS 67900, *32-43 (D. Utah Sept. 12, 2007) (dismissing allegations of Section 16(a) reporting violations for failure of proof).

Kantrowitz brought in approximately 1,100 certificates for liquidation during 2003 and 2004 (Tr. 2846). Perich knew that there was a continuing problem prior to November 24, 2003, getting Kantrowitz to honor his compliance responsibilities, and Perich had communicated with Brown numerous times about the issue (Tr. 2004, 2063-64). Goldstein became aware in November 2003 that there were difficulties getting Kantrowitz to complete the questionnaires on a timely basis (Tr. 1472-74, 1476-78). Goldstein and Brown also knew that the value of the questionnaire would be destroyed if stock was sold before the compliance department could determine if there was a problem with the certificate (Tr. 1500-01, 2239). In mid-November 2003, Goldstein learned that an employee in Newbridge's operations department was upset because Kantrowitz and other traders were not filling out the questionnaires (Tr. 1476-78, 1480-82; DX 141, DX 142). Goldstein viewed the situation as a personality conflict, but not a compliance issue (Tr. 1476-79). On November 24, 2003, Goldstein learned that Kantrowitz had not completed a questionnaire for a stock certificate that he had received thirteen days earlier (Tr. 1485-88; DX 143). At the hearing, Goldstein brushed off Kantrowitz's tardiness on the grounds that there was no evidence that the security in question had been sold (Tr. 1488). This reaction might have been consistent with the first version of the questionnaire (DX 97). It was inconsistent with the revised policy of November 5, 2003, which required the registered representative to complete the questionnaire "immediately upon receipt of the certificate" (Tr. 74, 2000; DX 98, DX 152).[40] On December 4, 2003, Goldstein was included on an e-mail message from the operations department requesting questionnaires from Kantrowitz with respect to five different stock certificates, including one of the Roanoke certificates (Tr. 1489-90; DX 57).

As Goldstein prepared to serve his thirty-day suspension in mid-December 2003, see supra note 38, he scheduled several meetings to ensure that things would run smoothly in his absence (Tr. 1580, 1663-64). Newbridge's department heads knew that they would have to go to Amico while Goldstein was suspended (Tr. 1663-64). Goldstein also shared with Amico the things that he thought Amico needed to know (Tr. 1664). However, Goldstein and Amico never discussed the failure of Newbridge's registered representatives, including Kantrowitz, to complete the questionnaires in a timely manner (Tr. 1666-67). In Goldstein's judgment, that situation was "under control" in early December 2003 (Tr. 1668).

[40] When the Division confronted Goldstein with evidence of Kantrowitz's thirteen-day delay in completing the questionnaire, Goldstein responded that he did not know how the compliance department defined the term "timely" (Tr. 1479, 1488). Goldstein also refused to express his own view as to whether Kantrowitz had completed the questionnaire in a timely manner (Tr. 1472, 1488).

In their posthearing brief, Amico and Goldstein still insist that the registered representatives did not need to complete the questionnaires until they sold stock. It is apparent that, even today, Amico and Goldstein fail to appreciate the November 5, 2003, policy change (DX 98, DX 152).

3. Supervisory Systems and Written Supervisory Procedures to Prevent and Detect Manipulation

Section 14 of Newbridge's 2002 Manual prohibited a wide range of questionable and illegal trading practices. These included publishing "fictitious quotes," quoting "in increments other than those determined by market forces of supply and demand," and displaying quotes "in order to help another market maker execute trades to its advantage" or "in order to orchestrate artificial price movements" (DX 117 at 174). Section 14 also identified a series of anti-competitive activities in which traders could not engage (DX 117 at 194-95). Finally, Section 14 prohibited market manipulation and identified several well-known manipulative techniques. It also stated: "No purchase or sell order may be entered that is designed to raise or lower the price of a security or to give the appearance of trading for purposes of inducing others to buy and sell" (DX 117 at 196).

Section 14 of the 2002 Manual required the "trading manager" to observe the traders on an ongoing basis, to look for anti-competitive activities, and to complete a monthly log documenting his findings (DX 117 at 198-200). The parties did not ask Perich whether he maintained such a log. Brown told Amico and Goldstein in June 2003 that he was going to verify whether the trading compliance officer was performing his assignments with the prescribed frequency (Tr. 1604-06; RX 116, Item V). However, Respondents did not provide evidence as to what Brown found after he completed his analysis. The relevant provisions of Section 14 did not otherwise contain any written supervisory procedures (Tr. 105, 938-39, 1441-42).

Newbridge issued a revised Business Policies and Procedures Manual in June and August 2004 (DX 118, DX 119). Unless otherwise noted, all references will be to DX 119, the August 2004 version (2004 Manual). Breitbart and Brown were the principal drafters (Tr. 932-33, 1562-64, 1569, 2291, 2664). They began their work in March 2004, using CCH software, and then sought help from several people at Newbridge (Tr. 1566, 2184-85, 2189-90, 2664, 2666; DX 148; RX 118). Amico again assisted in both drafting and reviewing (Tr. 915, 932, 940, 942). Goldstein was actively involved in monitoring the drafters' progress (Tr. 1658-60; DX 148).

Breitbart claimed that Vallejo and Perich reviewed certain sections of the draft revised Manual (Tr. 2664). In contrast, Vallejo stated that he had no role in drafting the 2004 Manual and could not recall if he was asked for his opinion as to any part of it (Tr. 1744-45). Amico never received assurances from Vallejo or Perich that the supervisory procedures in the 2004 Manual were adequate (Tr. 1318-19).

MGL Consulting Corporation (MGL) is a firm that provides regulatory consulting services to brokers, dealers, and investment advisers (Tr. 1565, 2887). As part of Newbridge's October 2003 settlement with the NASD, the firm engaged MGL to recommend changes to its retail sales practices and related supervisory system (Tr. 2889; DX 114 at 4). Newbridge did not retain MGL to draft its 2004 Manual (Tr. 2903). Breitbart explained that he tried to "leverage off of" MGL's work from the Spring of 2004 (Tr. 2664). MGL also reviewed Newbridge's penny stock activities, as well as its written supervisory policies and procedures with respect to

trading and market making (Tr. 2898-99).[41] MGL offered recommendations to enhance Newbridge's policies and procedures, but Newbridge did not retain MGL to back-test its implementation of these recommendations (Tr. 2899, 2903).

Several of the relevant provisions in the 2002 Manual were carried forward without change to the 2004 Manual. For example, Section 12.4.15 of Newbridge's 2004 Manual is identical to Section 14.4.15 of the firm's 2002 Manual (DX 117 at 174-75, DX 119 at 164). Neither section contains any written supervisory review procedures (Tr. 936-37, 943, 1441). Section 12.16.4.4 of Newbridge's 2004 Manual is identical to Section 14.14.4.4 of the firm's 2002 Manual (DX 117 at 196, DX 119 at 188). Neither section contains any written supervisory review procedures (Tr. 938, 941, 1442-43). Section 12.16.2.1 of Newbridge's 2004 Manual is identical to Section 14.14.2.1 of the firm's 2002 Manual (DX 117 at 194-95, DX 119 at 186-87). Neither section contains any written supervisory review procedures (Tr. 939, 942, 1441-42, 1444).

Newbridge did add a written supervisory review procedure to Section 12.16 of its 2004 Manual, which discusses prohibited activities (DX 118 at 174, DX 119 at 186). The new procedure required the head trader and the trading compliance manager regularly to observe traders' conduct and to confer as needed. The new procedure also required these supervisors to note any actions taken and document their reviews on a monthly supervisory checklist. Bush signed the monthly supervisory checklist for August 2004, the month of the heaviest Concorde trading, attesting that he had found no prohibited activities by traders (Tr. 2389-91; DX 103).

No one at Newbridge ever discussed with Kantrowitz whether his trading in Roanoke and Concorde complied with the firm's rules regarding the placing of quotations and market manipulation (Tr. 269, 400). Vallejo did little to implement any supervisory systems. He never met or spoke to Bojadzijev or Oehmke and could not recall discussing Roanoke with Kantrowitz (Tr. 1788-89, 1880-81). Vallejo does not believe that it is possible to prevent market manipulation while it is occurring, but only to detect it after the fact (Tr. 1743). Vallejo spoke to Kantrowitz about Concorde's price movement and press releases, but he could not recall the specifics (Tr. 1809-15). Bush also observed "red flags" while Concorde was trading (Tr. 2402-05, 2407-09). Bush spoke to Oehmke and raised his concerns with Breitbart and Gina Buddie (Buddie), the firm's chief operating officer, and perhaps with Amico, Goldstein, and Brown (Tr. 402, 2404-06; DX 91). However, Bush did not pursue an investigation once Oehmke's trading became less active after August 13, 2004 (Tr. 2408-09).

[41] There is no evidence as to the specific procedures MGL reviewed or the recommendations it made to Newbridge. Amico did not know what MGL did with respect to penny stocks (Tr. 1171). Daniel LeGaye (LeGaye) explained that this aspect of MGL's work was handled by Curtis Sorrells (Sorrells), an MGL employee who did not testify at the hearing (Tr. 2891-92, 2898-99). Sorrells was more knowledgeable about trading issues than LeGaye, and Sorrells spent more time at Newbridge than did LeGaye (Tr. 2891-92). Because LeGaye lacked specific knowledge about the particulars of Sorrells' work, I have given this part of LeGaye's testimony reduced weight.

E. Newbridge Did Not Develop Reasonable Systems to Review Instant Messages.

OIP ¶¶ D.23 and F.36 allege that Bojadzijev and Oehmke conveyed their manipulative intent to Kantrowitz through a series of instant messages. OIP ¶ G.42 alleges that Newbridge did not implement a policy to review instant messages until July 2004, although the NASD required its members to review instant messages starting in July 2003.

Amico understood when he and Goldstein acquired Newbridge that the firm needed to have procedures in place to review electronic communications (Tr. 1053). Newbridge's 2002 Manual defined "electronic communications" broadly and covered instant messages (Tr. 1053-55; DX 117 at 40-41).

In late June 2003, the NASD issued its Notice to Members 03-33, Instant Messaging (DX 127). The Notice clarified that member firms must archive and review instant messages like any other correspondence, and that, if a member firm could not meet these requirements, it must prohibit the use of instant messages (DX 127). Breitbart promptly informed Amico, Goldstein, Brown, and Perich about the Notice (Tr. 2636-37; DX 137; RX 135).

1. Supervisors Did Not Review Any Instant Messages Until August 2004.

At Newbridge, only a few individuals at the trading desk used instant messages (Tr. 188-89, 975, 978-79, 1268, 2295; DX 137; RX 138). On July 1, 2003, Breitbart convened a meeting to consider how Newbridge should respond to the NASD's Notice (Tr. 2638-39; DX 137).

I find as a fact that Amico, Goldstein, Brown, Buddie, and Perich attended Breitbart's meeting, as did a representative of the firm's information technology department (Tr. 1045-46, 1640-41, 2638). Recollections of the participants varied greatly. Breitbart characterized the meeting as preliminary (Tr. 2639). He noted that the participants discussed a couple of options, but he did not remember that they specifically adopted a review protocol (Tr. 2639). Amico, Goldstein, and Brown left the meeting with the impression that the firm's information technology department would be responsible for retaining instant messages and that Perich would be responsible for reviewing the messages (Tr. 1046, 1267-68, 1640-42, 2301). Brown and Breitbart also remembered that the information technology department would print hard copies of all instant message traffic (Tr. 2301, 2639). Buddie could not remember either the e-mail message inviting her to the July 1 meeting or the meeting itself (Tr. 2875-76). Perich did not recall the meeting either and denied that he was assigned the duty of reviewing the traders' instant messages (Tr. 1948-49, 2077). Breitbart equivocated about whether the meeting clearly identified Perich as the individual responsible for reviewing instant messages: "Jose would have been in a position to supervise it. And I don't know if I said or if anyone specifically said, 'Jose, are you following me here, are you with me?'" (Tr. 2639-40).

Newbridge's written supervisory procedures did not address the review of instant messages until mid-2004, approximately one year after the NASD issued its Notice. Perich did not review any instant messages while he was at Newbridge, and Kantrowitz never had a

conversation with Perich about any of his instant messages (Tr. 193, 1947).[42] Brown never supervised the review of instant messages while he was the chief compliance officer, and he could not recall a conversation with Perich as to whether Perich was reviewing instant messages (Tr. 2204-05). Vallejo never reviewed any of Kantrowitz's instant messages, either (Tr. 192, 1747).

It is undisputed that no one at Newbridge reviewed the instant messages between Kantrowitz and Bojadzijev about Roanoke. Amico and Goldstein contend that, notwithstanding this institutional breakdown, they reasonably believed that the supervisory system in place after July 1, 2003, required Perich to review instant messages.

There are no minutes of the July 1, 2003, meeting in the record. Accordingly, the parties focus on the participants' subsequent conduct as indirect evidence of what the participants may or may not have agreed to do during the meeting. The Division demonstrated that Perich's job duties are summarized in his April 2003 employment agreement and in two memoranda prepared during January 2004 (Tr. 1937-41, 2340, 2342-44, 2352-53; DX 105, DX 150, DX 153). These documents do not identify the review of instant messages as one of Perich's responsibilities (Tr. 2344). Respondents suggested that these documents may not have included all of Perich's duties (Tr. 2352-53). However, there is no evidence that Breitbart or anyone else objected to the documents as incomplete at the time and insisted that the documents be revised to include instant message review (Tr. 2353).

Respondents offer anecdotal evidence to show that Amico reasonably believed that Perich was reviewing instant messages after July 1, 2003. Amico described an occasion when he visited the trading room, heard and observed the exchange of instant message traffic, and asked Perich if he was watching out for it (Tr. 1268-69). Amico quoted Perich as responding: "Don't worry, I have your back" (Tr. 1269, 1307-08). Perich denied that any such discussion occurred (Tr. 1949). Vallejo described an occasion when Amico visited the trading room (Tr. 1862-63). According to Vallejo, Amico asked him who was watching the instant messaging, and Vallejo responded that Perich was (Tr. 1862-63). Vallejo also explained that Amico spoke to him, not to Perich (Tr. 1863). I find both Amico's and Vallejo's accounts incredible.[43]

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[42] Kantrowitz's instant messages were available for review by supervisors and compliance personnel at all times during 2003 and 2004 (Tr. 190-91).

[43] Amico visited the trading desk infrequently (Tr. 1140, 1169-70, 1268-69, 1863). If both of these accounts are accurate, it suggests that Amico made two visits to the trading room and asked the same question twice to two different supervisors. I find this to be highly unlikely, given Amico's testimony that he had only one such conversation (Tr. 1309-11). Amico's hearing testimony about a single discussion with Perich differed from his investigative testimony, when he could not recall conversations with anyone about instant messages (Tr. 1046, 1308-09). Amico's hearing testimony also conflicted with his unsworn statement that he had a "distinct recollection" of talking to Perich about instant message review "on more than one occasion" after the July 1, 2003, meeting (RX 154 at 30). Vallejo's certainty about his conversation with Amico contrasted with the remainder of his testimony, which was plagued by a purported inability to recall specifics.

2. The Instant Message Review Actually Conducted During August 2004 Did Not Follow Newbridge's Written Supervisory Procedures.

As to the period when Kantrowitz traded Concorde, Amico and Goldstein maintain that Newbridge had a written instant message review policy, but that Bush, the firm's trading compliance officer, conducted a random review that "unfortunately" missed the instant messages between Oehmke and Kantrowitz that are at issue in this proceeding.

Newbridge's June and August 2004 Manuals represented that the firm's information technology department would provide hard copies of all instant messages to the trading compliance officer (DX 118 at 66, DX 119 at 74). The 2004 Manuals also required the trading compliance officer to review all instant messages on a weekly basis; to date, initial, and retain the hard copies; and to note any corrective action taken (DX 118 at 66, DX 119 at 74).[44] The Trading Compliance Manager Monthly Supervisory Checklist, adopted in August 2004, represented the first time that Newbridge required the trading compliance officer to attest in writing that he was reviewing instant messages (Tr. 973-74; DX 103).

On July 21, 2004, Brown circulated an e-mail, reminding his subordinates in the compliance department to read the relevant section of the newly-revised Manual (Tr. 2306-07, 2345-46; DX 102). The e-mail also told the recipients that they should "ensure this is done effective this week" (DX 102). Brown further directed Wells and Barbara Hoops (Hoops) to "follow up" (DX 102). I infer that the language "effective this week" signals a change in Newbridge's policy regarding instant message review.

The written supervisory procedure set forth in the 2004 Manuals was not followed in practice. There is no evidence that anyone at Newbridge reviewed hard copies of all instant messages on a weekly basis during July and August 2004, while Kantrowitz was trading Concorde. Amico testified that Wells and Hoops were responsible for such a review after Perich resigned (Tr. 1274). There is no evidence as to what review, if any, Wells and Hoops actually performed between late May 2004, when Perich left the firm, and early August 2004, when Bush rejoined the firm. Bush was responsible for reviewing instant messages during and after August 2004 (Tr. 2877). However, Bush reviewed only a random sample of electronic versions of instant messages during the weeks of August 2-6 and 9-13, 2004 (Tr. 2384-85, 2436).[45]

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[44] The delegation of responsibility for instant message retention and review that is reflected in the June and August 2004 Manuals is consistent with the spreadsheet a Newbridge staff member prepared for Amico and Goldstein on May 21, 2004 (Tr. 1251-56; RX 66). The spreadsheet was prepared well after Kantrowitz had stopped trading in Roanoke, and it was contemporaneous with Perich's resignation (Tr. 1269-70, 1272, 1936). Its probative value is limited to the period when Kantrowitz traded Concorde.

[45] August 2-6, 2004, was Bush's first week on the job. During that week, he also helped Newbridge to switch clearing firms (Tr. 2385, 2428-29). Amico changed Wells' duties to DSCO effective July 30, 2004—six months later than Newbridge told the Commission's staff the DSCO position would be filled (DX 106, DX 116 at 5). However, there is no evidence as to why

Based on his other observations, Bush quickly realized that the Concorde transactions were likely to draw scrutiny from regulators (Tr. 2402-03). However, even then, there is no evidence that he pulled the Kantrowitz-Oehmke instant message traffic for analysis. As Bush settled into his job, he later spent four to five hours a month reviewing a random sample of instant messages (Tr. 2391). He did not review all the instant messages, and the information technology department did not provide him with hard copies to initial and retain (Tr. 2391-92, 2436, 2464-65).

There is a significant disparity between what Newbridge's information technology department was capable of delivering and what Breitbart and Brown, the drafters of Newbridge's 2004 Manuals, assumed it was delivering. The Division established that Newbridge's information technology department never printed hard copies of all instant messages, even as late as August 2004 (Tr. 2392). When Newbridge again revised its Manual in March 2005, the 2005 Manual retained the same wording as the June and August 2004 Manuals, stating that the information technology department was responsible for delivering hard copies of all instant messages to the trading compliance officer (DX 133, § 5.14.2).

During the Commission investigation leading to this proceeding, Amico and Goldstein learned that no one at Newbridge had reviewed any instant messages before August 2004 (Tr. 1275, 1642). Amico and Goldstein responded by shutting down instant message capabilities for everyone at the firm in 2005 (Tr. 1275, 1642-43, 2876-78).

IV. WITNESS CREDIBILITY

Oehmke, Bush, Breitbart, and Buddie were generally credible witnesses. With the reservations previously noted, see supra notes 13 & 41, Bojadzijev and LeGaye were also credible witnesses.

Kantrowitz was not credible when he testified that he was unable to remember why the NASD disciplined him in 1996, why he was subject to a registration agreement at Newbridge, and whether he knew that Kos was involved with Concorde. Equally incredible were his claims that he believed Bojadzijev to be a mathematician with a short term trading strategy; that no insider trading occurs if a registered representative executes a transaction for a customer possessing non-public information, as long as the registered representative does not execute a similar transaction in his own account; and that "I am away" means "I am out of town." Like Kantrowitz, Amico, Goldstein, Vallejo, Perich, and Brown were credible only in part.

The Division engaged John E. Pinto (Pinto) to provide expert testimony about whether Kantrowitz manipulated the market for Roanoke and Concorde (Tr. 773-835; DX 124). Pinto has almost forty years of regulatory and compliance experience in the securities industry. From

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Amico, Goldstein, or Brown did not assign Wells and Hoops, the junior compliance officers singled out in Brown's July 21 e-mail, to review the instant messages during the August 2004 transition period, if Bush was occupied with other matters.

1989 to 1997, he was Executive Vice President for Regulation at the NASD, and was responsible for all of the NASD's examination, surveillance, and enforcement programs. He is now managing director of Renaissance Regulatory Services, which provides regulatory and compliance consulting services to brokers and dealers. I find Pinto well qualified to offer expert opinion testimony.

Pinto opined that Kantrowitz knowingly participated in fraudulent schemes to manipulate the prices for Roanoke and Concorde at the direction of Bojadzijev and Oehmke, respectively (Tr. 774-75; DX 124 at 3). In Pinto's view, Kantrowitz did so to facilitate the liquidation by Bojadzijev and Oehmke of large blocks of stock in Roanoke and Concorde, respectively (Tr. 775; DX 124 at 3).

I have disregarded those portions of Pinto's presentation that relied on facts not in evidence and/or expressed opinions on issues not covered by the OIP (Tr. 827-34; DX 124 ¶¶ 8, 11, 12, 15, 18, 19). These include Pinto's testimony that: (1) Newbridge and Kantrowitz promoted themselves as specializing in liquidating large blocks of illiquid stocks and as being one of the largest firms in the country when it came to liquidating Bulletin Board and Pink Sheet stocks; (2) Kantrowitz won many awards for his productivity at Newbridge; (3) 300 million shares represented "virtually" half the public float of Roanoke stock; (4) with respect to Roanoke, "the parties" enlisted "at least" one other market maker to facilitate the manipulative scheme, and Kantrowitz acted "possibly in collusion" with "at least" one other broker-dealer; (5) with respect to Concorde, "it appears highly likely (and Kantrowitz was aware)" that Oehmke had accounts "at more than just one other broker-dealer;" and (6) with respect to Concorde, "multiple parties," not merely Kantrowitz and Hansen, acted in collusion. Assertions (1)-(3) reflect matters that may find support in the investigative record, but that the Division elected, for whatever reason, not to present during the hearing (Tr. 832). Assertions (4)-(6) are different: they stray well beyond any allegation in the OIP and any evidence presented at the hearing.

It was surprising that Respondents' counsel asked Pinto questions that all but invited him to evaluate the credibility of a prior witness's testimony (Tr. 796, 824). I have disregarded both the questions and the responses. See United States v. Scop, 846 F.2d 135, 142 (2d Cir. 1988).

Pinto described Kantrowitz as "aggressively bidding up the shares of [Roanoke]" and as "consistently leading bids [for Roanoke] higher and higher" (DX 124 ¶¶ 20-21). This was hyperbole. Newbridge made 615 bid changes in Roanoke during the relevant period: 315 bid changes up and 300 bid changes down (DX 47, last page). It is true that Kantrowitz's bids on behalf of Bojadzijev increased in price during the period before November 28, 2003, and between December 10 and 12, 2003 (DX 65). However, the upward movement was measured in tenths of a penny and hundredths of a penny. Audit trail data show Roanoke transaction prices falling at other times (DX 46, trades ## 15-21, 41-56).

John R. Smith (J. Smith) testified as an expert witness for the Division on supervisory issues (Tr. 2476-2596; DX 123). J. Smith has approximately forty years of experience in the securities industry. He has been a registered representative, branch manager, president, and owner of a brokerage firm and an investment adviser, and he has created and supervised compliance departments and written or revised compliance and supervisory manuals. J. Smith

has also served as a consultant for customers of securities firms, companies within the securities industry, and regulators (DX 123, Ex. B). I find J. Smith well qualified to offer expert opinion testimony.

J. Smith opined that Amico and Goldstein failed to discharge their supervisory obligations (DX 123 at 8-22). In J. Smith's judgment, Amico and Goldstein: (1) possessed ultimate joint supervisory responsibility for compliance at Newbridge; (2) failed reasonably and effectively to delegate their supervisory duties; and (3) were on notice that their delegation was not reasonable and effective (DX 123 at 8-22).

David E. Paulukaitis (Paulukaitis) testified as an expert witness for Amico and Goldstein on supervisory issues (Tr. 2693-2773, 2781-2838; RX 154). Paulukaitis is managing director of Mainstay Capital Markets Consultants, Inc. (Mainstay), a firm that provides compliance consulting services to brokers, dealers, and registered investment advisers. Mainstay entered into a consulting agreement with Newbridge in August 2006, and has provided general compliance consulting services to the firm since then. Before Paulukaitis joined Mainstay in 2005, he was employed for twenty-three years in the Atlanta District Office of the NASD. Paulukaitis has also served, and is currently serving, as an expert witness on behalf of the Division in conjunction with other administrative proceedings (RX 154 at 4-5). I find Paulukaitis well qualified to offer expert opinion testimony.

Paulukaitis did not offer an opinion about market manipulation, nor did he evaluate the adequacy of Newbridge's written supervisory procedures (Tr. 2705, 2710-11, 2714, 2783). He opined that the delegation of supervisory authority by Amico and Goldstein was reasonable because: (1) the individuals to whom supervisory responsibility was granted were qualified, experienced, and knowledgeable; (2) Amico and Goldstein established mechanisms for routine follow-up; and (3) when questions or concerns came to their attention, Amico and Goldstein took reasonable steps to address those matters (RX 154 at 35).

In preparing his direct written testimony, Paulukaitis interviewed several Newbridge employees, each for an hour or more (Tr. 2703-04). He then based his opinions, in part, on what these employees told him (Tr. 2704). Two such interviewees, Robin Bush and James Acevedo, did not testify during the hearing. Other interviews produced material that, on balance, was harmful to Respondents. For example, Vallejo admitted that he occasionally procrastinated in reviewing trade blotters and Brown volunteered his belief that Vallejo just occasionally did not want to review trade blotters (RX 154 at 16-17). Perhaps the most damaging interview statement came from Amico, who told Paulukaitis that he had a "distinct recollection" of discussing instant message review with Perich "on more than one occasion" after July 1, 2003 (RX 154 at 30). As previously discussed, Amico testified quite differently during the Commission's investigation, and quite differently again at the hearing. See supra note 43.

The Division moves to strike all references to these extra-record interviews from Paulukaitis's direct written testimony (Tr. 2838-39). I deny the Division's motion. Paulukaitis conducted these interviews because he was looking for inconsistencies with prior investigative testimony (Tr. 2704). In Amico's statement about his "distinct recollection," Paulukaitis struck

the mother lode of inconsistencies. I have not given any weight to Paulukaitis's other extra-record interviews.

DISCUSSION AND CONCLUSIONS

I. KANTROWITZ VIOLATED THE REGISTRATION REQUIREMENTS.

OIP ¶ I.58 alleges that Kantrowitz willfully violated Sections 5(a) and 5(c) of the Securities Act because he sold Roanoke shares that were not the subject of an effective registration statement.

A. Kantrowitz Participated in an Unregistered Distribution of Roanoke Stock.

Section 5(a) of the Securities Act prohibits any person, directly or indirectly, from selling a security in interstate commerce unless a registration statement is in effect as to the offer and sale of that security or there is an applicable exemption from the registration requirements. Section 5(c) of the Securities Act prohibits the offer or sale of a security unless a registration statement as to such security has been filed with the Commission or an exemption is available. The purpose of the registration requirements is to "protect investors by promoting full disclosure of information thought necessary to informed investment decisions." SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953); SEC v. Murphy, 626 F.2d 633, 642-43 (9th Cir. 1980).

The elements of a prima facie violation of Section 5 are that (1) no registration statement was filed or in effect as to the security; (2) the respondent, directly or indirectly, sold or offered to sell the security; and (3) interstate transportation or communication or the mails were used in connection with the offer or sale. SEC v. Cont'l Tobacco Co., 463 F.2d 137, 155 (5th Cir. 1972). Section 5 imposes strict liability on offerors and sellers of unregistered securities, regardless of any degree of fault on the seller's part. Swenson v. Engelstad, 626 F.2d 421, 424 (5th Cir. 1980).

The prohibitions in Section 5 extend not only to those who engage in the actual sale of securities, but also to those who engage in significant steps in the distribution process. A respondent may be held primarily liable for a securities registration violation if he or she was a "necessary participant" and a "substantial factor" in the unlawful transaction. See SEC v. Calvo, 378 F.3d 1211, 1215 (11th Cir. 2004); Murphy, 626 F.2d at 649-52.

Willfulness is shown where a person intends to commit an act that constitutes a violation. There is no requirement that the actor also be aware that he is violating any statutes or regulations. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 & n.5 (2d Cir. 1976).

The parties agree that Bojadzijev received 300 million shares from Roanoke under the Form S-8 registration statement dated November 21, 2003, and then resold more than 233 million of these shares through his Newbridge account within six weeks. Kantrowitz and Bojadzijev communicated by facsimile, telephone, and instant message (Tr. 188, 471, 477; DX 44, DX 65). Kantrowitz also traded Roanoke through the electronic capabilities of the OTCBB.

With Kantrowitz's prodding, Newbridge authorized Bojadzijev to remove some of the proceeds from these sales by wire. The resale transactions therefore used the instruments of interstate commerce.

No registration statement was in effect as to the 233 million shares of Roanoke stock that Bojadzijev resold to the general public through Kantrowitz. A registration statement permits an issuer, or other persons, to make only the offers and sales described in the registration statement. SEC v. Cavanagh, 155 F.3d 129, 133 (2d Cir. 1998). Form S-8 provides, in certain situations, for the resale of shares pursuant to a reoffer prospectus or a post-effective amendment to the Form. In the alternative, an issuer may register the reoffer or resale of such shares by means of a separate registration statement. The Commission's official public records (EDGAR) do not contain such a filing with respect to the Roanoke shares at issue (official notice) (Order of April 13, 2009). Respondents might still argue that the resale transactions were exempt from registration, but they must sustain their burden of showing that Bojadzijev was a person other than an issuer, an underwriter, or a dealer. As discussed infra, they have not done so.

Kantrowitz's liability need not turn on whether Roanoke's initial grant of shares to Bojadzijev was properly registered.[46] Assuming arguendo that Roanoke's Form S-8 was effective as of November 21, 2003, because Roanoke intended to compensate Bojadzijev for

[46] Amico and Goldstein urge me to place great weight on the fact that Bojadzijev lied to Kantrowitz and others at Newbridge. I decline to do so. Kantrowitz easily could have determined from the Commission's web site that there was no reoffer prospectus, no post-effective amendment, and no separate registration statement covering the resale of these Roanoke shares. Kantrowitz did not need to speak to Bojadzijev to obtain this information. Kantrowitz also could have determined from reading Bojadzijev's account opening documents that Bojadzijev was twenty-three years of age, with a limited formal education. He then could have reached his own conclusions as to whether such a person would be able to perform the full range of duties described in the consulting agreement.

Amico and Goldstein also argue that there is no evidence that Newbridge's compliance department did not eventually review Roanoke's November 21, 2003, Form S-8 and the attachments thereto. This claim is dubious, at best. Breitbart never even read the Form S-8 when he met with Bojadzijev and recommended closing his account (Tr. 2676-80). Brown never even ensured that the questionnaires were completed (Tr. 2242-44). Any competent compliance official reading Roanoke's Form S-8 would immediately have been struck by two discrepancies that are apparent on the face of the document. On page 1 of the Form S-8, there is the statement: "Approximate date of commencement of proposed sale to the public: Upon the effective date of this Registration Statement." In Part II, Item 8, of the Form S-8, the description of the exhibits refers to a November 7, 2003, consulting agreement between Barry Clark and Roanoke, not the November 19, 2003, consulting agreement between Bojadzijev and Roanoke.

Respondents' arguments are unpersuasive for the additional reason that they focus on Roanoke's original grant of shares to Bojadzijev, but ignore Bojadzijev's resale of shares to the general public.

bona fide consulting services, the S-8 registration ceased to be effective once Bojadzijev wired some of the sale proceeds to Roanoke. Kantrowitz knew of this by November 28, 2003, at the latest. He also knew that Bojadzijev had a history of pushing for the early release of the proceeds from other penny stock sales. Under this analysis, the initial legitimacy of Roanoke's Form S-8 is irrelevant to Kantrowitz's liability under Section 5 of the Securities Act, because Bojadzijev resold his shares through Kantrowitz to raise capital for Roanoke at Roanoke's request. See Phan, 500 F.3d at 902-06; SEC v. Aqua Vie Bev. Corp., 2007 U.S. Dist. LEXIS 35249, *41-50 (D. Idaho May 14, 2007) (Magistrate Judge).

The record supports a conclusion that Kantrowitz participated in the sale of Bojadzijev's Roanoke securities in violation of the registration requirements of Section 5 of the Securities Act. Kantrowitz played a crucial role as the dominant trader who made a market in Roanoke stock. This evidence easily satisfies the "necessary participant" and "substantial factor" elements of the participant liability test.

B. Bojadzijev Was an Underwriter.

Exemptions from registration are affirmative defenses that must be established by the person claiming the exemptions. Engelstad, 626 F.2d at 425; Lively v. Hirschfeld, 440 F.2d 631, 632 (10th Cir. 1971). Further, exemptions from the general policy of the Securities Act requiring registration are strictly construed against the claimant. See Murphy, 626 F.2d at 641. "Evidence in support of an exemption must be explicit, exact, and not built on mere conclusory statements." Robert G. Weeks, 56 S.E.C. 1297, 1322 & n.35 (2003).

Section 4(1) of the Securities Act exempts from the registration requirement "transactions by any person other than an issuer, underwriter, or dealer." Section 2(a)(11) of the Securities Act defines the term "underwriter" to include "any person who . . . offers or sells for an issuer in connection with the distribution of any security, or participates . . . in any such undertaking. . . ." The term "distribution" is not defined in the Securities Act, but refers to "the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hands of the investing public." Jacob Wonsover, 54 S.E.C. 1, 12 & n.25 (1999), pet. denied, 205 F.3d 408 (D.C. Cir. 2000). Section 4(1) is intended to exempt routine trading transactions between individual investors with respect to securities already issued and not to exempt distributions by issuers or acts of other individuals who engage in steps necessary to such distributions. See Preliminary Note to Rule 144, 17 C.F.R. § 230.144; Owen V. Kane, 48 S.E.C. 617, 619 (1986), aff'd, 842 F.2d 194 (8th Cir. 1988). Individual investors may be deemed "underwriters" within the statutory meaning of that term if they act as links in a chain of securities transactions from issuers or control persons to the public. Id. A sale by the intermediary in such a distribution is a transaction by an underwriter and thus not exempt from registration under Section 4(1).

The strongest indicators of Bojadzijev's "underwriter" status are his acknowledgement that he wanted to unload a lot of shares quickly and the short time period between his acquisition of Roanoke shares and his resale of those shares through Kantrowitz. The large number of shares involved is also significant. Finally, the fact that Bojadzijev pressured Kantrowitz for the early release of the sales proceeds so that he could remit some of the funds to D. Smith is

persuasive evidence that Roanoke, not Bojadzijev, controlled the timing and amount of the sales. Accordingly, Bojadzijev acted as a conduit for the distribution to the public of the S-8 shares. He functioned as a statutory underwriter for the distribution, and any sales in connection therewith were not exempt from registration under Section 4(1) of the Securities Act.[47] See Ira Haupt & Co., 23 S.E.C. 589, 597 (1946).

C. The Broker's Exemption in Securities Act Section 4(4) Does Not Apply.

To defend against the charge that Kantrowitz participated in the unregistered distribution of Roanoke securities, Amico and Goldstein belatedly invoke the broker's exemption in Section 4(4) of the Securities Act.[48] That provision exempts "brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market" from the registration requirements of Section 5. However, this exemption is not available to a broker who knows or has reasonable grounds to believe that the selling customer's part of the transaction is not exempt from Section 5. In that event, the broker violates Section 5 of the Securities Act because it participates in a non-exempt transaction. See United States v. Wolfson, 405 F.2d 779, 782-83 (2d Cir. 1968); John A. Carley, 92 SEC Docket 1693, 1708 (Jan. 31, 2008), pet. for review pending sub nom. Zacharias v. SEC, D.C. Cir., No. 08-1134; Wonsover, 54 S.E.C. at 13 & n.27; Robert G. Leigh, 50 S.E.C. 189, 193 (1990).

The amount of inquiry required of a broker or dealer necessarily varies with the circumstances of each case; however, "when a dealer is offered a substantial block of a little-known security . . . or where the surrounding circumstances raise a question as to whether or not the ostensible sellers may be merely intermediaries for controlling persons or statutory underwriters, then searching inquiry is called for." Distribution by Broker-Dealers of Unregistered Securities, Securities Act Rel. No. 4445 (Feb. 2, 1962), 27 Fed. Reg. 1251 (Feb. 10, 1962); see also Kane v. SEC, 842 F.2d 194, 199 (8th Cir. 1988); Wonsover, 54 S.E.C. at 14; Leigh, 50 S.E.C. at 193.

The duty of inquiry extends beyond brokers and dealers to their registered representatives. First Pittsburgh Secs. Corp., 47 S.E.C. 299, 302 (1980) ("While salesmen have a lesser responsibility for compliance with registration requirements than their superiors, . . . salesmen cannot absolve themselves of all responsibility simply by relying on senior officials of their firm."); Paul L. Rice, 45 S.E.C. 959, 961 (1975) (while salesmen need not be "finished scholars in the metaphysics of the Securities Act, . . . familiarity with the rudiments is essential.").

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[47] Because Bojadzijev was an underwriter, it is unnecessary to consider Amico's and Goldstein's claim that Bojadzijev was not an affiliate of the issuer. Because Kantrowitz was a participant, it is unnecessary to consider the Division's argument that Kantrowitz was also an underwriter.

[48] Under Rule 220(c) of the Commission's Rules of Practice, affirmative defenses must be raised in an Answer. Amico and Goldstein did not raise the Section 4(4) affirmative defense until their posthearing reply brief.

"Brokers and securities salesmen are under a duty to investigate, and a violation of that duty brings them within the term 'willful' of the Securities Act." Quinn & Co., Inc., v. SEC, 452 F.2d 943, 947 (10th Cir. 1971). "[W]illfulness can be found if a broker or dealer who is aware of several facts suggesting a suspicious transaction proceeds to facilitate the sale with reckless indifference to such facts, and ignores the obvious need for further inquiry and the duty to disclose all relevant information to his superiors." Kane, 842 F.2d at 200.

Kantrowitz, an experienced trader and registered representative, did not make a "searching inquiry," even though Bojadzijev asked him to liquidate several large blocks of a thinly-traded penny stock. He did not question Bojadzijev closely about the nature of Bojadzijev's consulting work or the origin of the Roanoke certificates Bojadzijev brought to Newbridge. Kantrowitz did not complete the stock certificate deposit questionnaires "immediately," as required by Newbridge policy, but instead delayed for weeks. In two instances, he allowed another trading desk employee to obtain the relevant information from Bojadzijev and signed documents that the trading desk employee put in front of him, despite obvious discrepancies as to the origin of the shares in question. Kantrowitz knew that Bojadzijev was wiring some of the proceeds of his stock sales back to Roanoke. He also knew that Roanoke had issued shares in fifty million share increments to keep Bojadzijev under the so-called 10% rule, but he never followed up on this suspicious statement. At most, Kantrowitz made a minimal effort to determine if Roanoke's grant of shares to Bojadzijev was properly registered on Form S-8. He made no effort to determine if Bojadzijev's resale of those shares to the general public was registered.

The reason for Kantrowitz's lack of curiosity is obvious: he had developed a lucrative business liquidating penny stock certificates for consultants and promoters, and he was not about to kill the goose that was laying golden eggs. As one Newbridge compliance official acknowledged, such penny stock customers are likely to take their business elsewhere if a brokerage firm asks them too many questions (Tr. 2396-97) ("the hassle factor"). In sum, Kantrowitz was indifferent to the registration status of the Roanoke stock Bojadzijev asked him to resell, and he cannot rely on the brokers' exemption in Section 4(4) of the Securities Act.

D. Miscellaneous Defenses

Amico and Goldstein point to Kantrowitz's purported reliance on the transfer agent, Bojadzijev, and his own supervisors. These contentions also lack merit. See, e.g., Quinn, 452 F.2d at 947 (petitioners "were not entitled to rely on the lack of cautionary legends on the stock certificates"); Kane, 842 F.2d at 200 (rejecting petitioner's "reliance on the self-serving statements of his seller"); Feeney v. SEC, 564 F.2d 260, 262 (8th Cir. 1977) (rejecting petitioners' "claim that they were entitled to rely on the assurances of the other company officers that registration was not required"); Stead v. SEC, 444 F.2d 713, 716 (10th Cir. 1971) (broker's call to transfer agent not sufficient inquiry).

In light of his failure to discharge his duty as a registered representative conducting a searching inquiry to determine whether the resales of Bojadzijev's Roanoke shares were part of

an illegal unregistered distribution, I conclude that Kantrowitz willfully violated Sections 5(a) and 5(c) of the Securities Act.

II. KANTROWITZ ALSO VIOLATED THE ANTIFRAUD PROVISIONS.

OIP ¶ I.57 alleges that Kantrowitz willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5 by participating in schemes with Bojadzijev and Oehmke to manipulate Roanoke and Concorde stock, respectively.

Amico and Goldstein do not dispute that Bojadzijev and Oehmke engaged in market manipulation. They also acknowledge that much of the evidence with respect to Kantrowitz's interaction with these two customers is troubling. Nonetheless, they contend that the weight of the evidence shows that Kantrowitz acted only negligently, and not with manipulative intent.

A. The Applicable Law

The Commission has characterized manipulation as "the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free forces of supply and demand." Swartwood, Hesse, Inc., 50 S.E.C. 1301, 1307 & n.16 (1992).

The basic aim of the antifraud provisions of the securities laws is to "prevent rigging of the market and to permit operation of the natural law of supply and demand." SEC v. First Jersey Secs., Inc., 101 F.3d 1450, 1466 (2d Cir. 1996) (quoting United States v. Stein, 436 F.2d 844, 850 (2d Cir. 1972)). In Section 2 of the Exchange Act, Congress explained that one of the primary objectives of the statute was to "insure the maintenance of fair and honest markets." The manipulation of securities prices, which constitutes "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities," Hochfelder, 425 U.S. at 199, runs directly counter to that objective.

Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of any security. Section 10(b) encompasses "(1) using any deceptive device (2) in connection with the purchase or sale of securities, in contravention of rules prescribed by the Commission." United States v. O'Hagan, 521 U.S. 642, 651 (1997). Rule 10b-5 contains "flat prohibitions of deceitful practices and market manipulations." United States v. Charnay, 537 F.2d 341, 350 (9th Cir. 1976). Conduct falling within the purview of Rule 10b-5 includes "every device 'used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage.'" SEC v. Resch-Cassin & Co., 362 F. Supp. 964, 975 (S.D.N.Y. 1973) (quoting 3 Loss, Securities Regulation 1549-55 (2d ed. 1961)).

Section 17(a)(1) of the Securities Act makes it unlawful, in the offer and sale of securities, to employ devices, schemes or artifices to defraud. Section 17(a)(2) of the Securities Act prohibits material misstatements or omissions of material facts, and Section 17(a)(3) of the Securities Act prohibits transactions, practices, or courses of business that operate as a fraud or deceit upon the purchaser.

Recognizing that Section 10(b) outlaws but does not define a "manipulative or deceptive device or contrivance," it is appropriate to turn to Section 9(a)(2) of the Exchange Act to determine the elements of the offense of manipulation. See Resch-Cassin, 362 F. Supp. at 975.

Section 9(a)(2) of the Exchange Act makes it unlawful, with respect to a security listed on a national securities exchange, to effect: (1) a series of security transactions, alone or with one or more persons; (2) which create actual or apparent active trading in such security or which raise or depress the price of such security; (3) for the purpose of inducing others to buy or sell the security. Manipulative activities of the type prohibited by Section 9(a)(2) of the Exchange Act are also violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act. See id. In addition, Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act are deemed to prohibit manipulative activities with respect to securities that are not traded on a national securities exchange. See id.; Halsey, Stuart & Co., 30 S.E.C. 106, 110-11 (1949). However, when the basis of liability rests on Section 10(b) and Rule 10b-5, it is not necessary to show a manipulative purpose in inducing others to trade. See Charnay, 537 F.2d at 350-51. Instead, it is sufficient to show that the person engaged in a fraud or deceit as to the nature of the market for the security. See id.

Proof of manipulation almost always depends on inferences drawn from a mass of factual detail, including patterns of behavior, apparent irregularities, and trading data. Pagel, Inc., 48 S.E.C. 223, 226 (1985), aff'd, 803 F.2d 942 (8th Cir. 1986).

To prevail under Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, the Division must show that a respondent acted with scienter. See Hochfelder, 425 U.S. at 193 n.12; Aaron v. SEC, 446 U.S. 680, 701-02 (1980); Pagel, Inc. v. SEC, 803 F.2d 942, 946 (8th Cir. 1986). No scienter requirement exists for violations of Sections 17(a)(2) or 17(a)(3) of the Securities Act; rather, negligence alone is sufficient. Aaron, 446 U.S. at 702; Pagel, 803 F.2d at 946.

Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud." Hochfelder, 425 U.S. at 193 n.12. It may be established by a showing that the accused party acted intentionally or with severe recklessness. SEC v. Steadman, 967 F.2d 636, 641 (D.C. Cir. 1992); Hackbart v. Holmes, 675 F.2d 1114, 1117 (10th Cir. 1982). Recklessness is defined as "not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it." Sunstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1977).

A trader can be primarily liable under Section 10(b) of the Exchange Act for following a principal's directions to execute stock trades that the trader knew, or was reckless in not knowing, were manipulative, even if the trader did not share the principal's specific overall purpose to manipulate the market for that stock. SEC v. U.S. Envtl., Inc., 155 F.3d 107, 108, 110-12 (2d Cir. 1998).

Most of the courts addressing the issue have held that Congress envisioned liability for market manipulation where the actor's conduct was entirely legal, but the actor's intent was

manipulative. See Markowski v. SEC, 274 F.3d 525, 528-29 (D.C. Cir. 2001); SEC v. Masri, 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007). Other courts have suggested that liability for manipulation also requires proof that the actor injected inaccurate information into the market or created a false impression of market activity. See GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 205 (3d Cir. 2001). Amico and Goldstein claim that there is a species of "open market manipulations" that can be distinguished from other types of manipulations and that require a higher standard of proof or intent. The more persuasive cases reject this argument. See In re Initial Public Offering Secs. Litig., 241 F. Supp. 2d 281, 391 (S.D.N.Y. 2003) (holding that so-called "open market manipulations" are merely "those cases involving conduct that stands near the line between illegal and legal activity because their resolution turns less on conduct and more on the intent of the defendants.").

B. Kantrowitz Manipulated Roanoke.

Newbridge exercised price leadership by frequently raising its bid for Roanoke stock and by holding the inside bid in the stock for a significant amount of the total trading hours during the relevant period. To the extent that Kantrowitz posted these bids for Bojadzijev, see supra note 13, he created the false appearance that the bid side of the market for Roanoke was more active than it was in reality.[49] By doing so, Kantrowitz made the stock more attractive to prospective buyers, and he created liquidity for Bojadzijev to sell several large blocks of Roanoke stock.

Division expert Pinto found it highly significant that Bojadzijev was a large seller who had no legitimate interest in purchasing Roanoke stock (Tr. 791; DX 124 ¶¶ 9, 21-22). Amico and Goldstein argue the opposite. They contend that Kantrowitz believed that Bojadzijev was sometimes a buyer and sometimes a seller, so that Bojadzijev's bids to purchase Roanoke stock raised no red flag for Kantrowitz. I agree with Pinto's analysis. Bojadzijev, like almost all of Kantrowitz's retail customers, opened a Newbridge account in order to liquidate quickly certificates for low priced securities. Kantrowitz had already liquidated several penny stock certificates for Bojadzijev before the trading in Roanoke commenced. As to Roanoke, Kantrowitz knew that Bojadzijev's primary objective was to sell his 300 million shares. Kantrowitz also knew from the small size of Bojadzijev's bids (usually, the 5,000 share minimum) that Bojadzijev was risking only about $15 to $25 if his bids were accepted (Tr. 140-41, 204-07). He must have known that Bojadzijev was a high school dropout and that Bojadzijev's claim to being a mathematician with a short-term trading strategy was bogus. By December 2, 2003, Kantrowitz further knew that Bojadzijev would like to move up the price of Roanoke, because Bojadzijev told him so. In these circumstances, Bojadzijev's bids were not bona fide, and Kantrowitz should have refused to post them. See Graham v. SEC, 222 F.3d 994,

[49] Amico and Goldstein cannot rely on GFL Advantage Fund because the weight of the evidence demonstrates that Kantrowitz created the false impression of market activity. Nor may they fairly compare the present case to Masri, where a registered representative won summary judgment because the circumstantial evidence concerning the execution of a single transaction was deemed insufficient to establish the registered representative's knowledge of any manipulative intent of his principal.

1004 (D.C. Cir. 2000) ("A registered representative can always refuse to execute a trade [he] knows may constitute a securities violation. . . . Of course, doing so might [make the registered representative's] career . . . more difficult, but fear of such consequences does not excuse a violation of the securities laws.").

Kantrowitz acted with scienter. His own words, actions, and failure to act show that he not only knew of Bojadzijev's scheme to "buoy" Roanoke's price (in the wording of the OIP), but that he actively participated in the scheme. On November 20, 2003, when Bojadzijev could not legitimately post an offer because he did not have any Roanoke shares to sell, Kantrowitz volunteered to test the market for Bojadzijev, using Newbridge's proprietary account. On November 25, December 10, and December 12, 2003, when Bojadzijev told Kantrowitz he had advance news about Roanoke, Kantrowitz never asked Bojadzijev how he knew these facts. Kantrowitz also failed to alert his supervisors to the possibility of insider trading. On December 12, 2003, when market participants commented in a chat room that Newbridge was simultaneously posting both small bids and large offers in Roanoke, Kantrowitz told Bojadzijev: "I think it's pretty amusing. . . . doesn't any of them have a brain? Or a clue?"

The evidence does not support the OIP's claim that Bojadzijev controlled almost half of the floating supply of Roanoke stock. See supra note 4. But that is not fatal to the Division's case. The Commission has held that a finding of manipulation does not depend on the presence or absence of any particular device usually associated with a manipulative scheme. See Swartwood, Hesse, 50 S.E.C. at 1307. Nor does it matter that Roanoke's price did not move very high during the manipulative period. Cf. SEC v. Kwak, 2008 U.S. Dist. LEXIS 10201, *7-8 n.4 (D. Conn. Feb. 12, 2008) ("By artificially creating demand, [a manipulator] can prevent or slow price decreases, even if [the manipulator] is unable to create price increases."). Whether an accused has adequate market power successfully to manipulate a market is not dispositive of whether the accused engaged in a manipulative scheme, because success is not a prerequisite for a finding of manipulation. See Kuehnert v. Texstar Corp., 412 F.2d 700, 704 (5th Cir. 1969); SEC v. Mandici, 2004 U.S. Dist. LEXIS 19143, *33 (S.D.N.Y. Sept. 27, 2004); Amr Elgindy, 57 S.E.C. 431, 440 & n.21 (2004); cf. SEC v. Martino, 255 F. Supp. 2d 268, 287 (S.D.N.Y. 2003) ("an attempted manipulation is as actionable as a successful one"), aff'd and remanded on other grounds, 94 Fed. Appx. 871 (2d Cir. 2004).

Amico and Goldstein observe that Kantrowitz entered only unsolicited bids for Bojadzijev, that Bojadzijev never explicitly told Kantrowitz he intended to manipulate the market for Roanoke, and that Kantrowitz was very busy making markets in hundreds of other stocks during the relevant time period. I reject these defenses. Whether the bids were unsolicited has no bearing on Kantrowitz's knowledge of the manipulation. The manipulative purpose of the trading was clear from the trading patterns, even without a direct admission by the customer. Being busy is not an excuse for violating the federal securities laws.

C. Kantrowitz Manipulated Concorde.

The Division has presented a strong case that Kantrowitz schemed with Oehmke to manipulate the market for Concorde between June 30 and August 13, 2004. Kantrowitz knew that Oehmke was a seller, not a buyer, for the same reasons he knew that Bojadzijev was a seller,

not a buyer. Under the circumstances, Kantrowitz had an obligation to confront Oehmke about why Oehmke placed escalating bids for Concorde when his primary goal was to liquidate 1,000,000 shares of Concorde stock in Barranquilla's account. Kantrowitz never did so.

Kantrowitz repeatedly raised the bid prices he posted for Oehmke between June 30 and July 26, 2004, at a time when he knew that there were no available shares in the market (Tr. 798-99, 801, 806, 817-18, 821). The market depends on participants behaving rationally: buyers trying to buy as low as they can and sellers trying to sell as high as they can. Whenever a prospective buyer intentionally offers to pay more than he has to for the purpose of causing the quoted price to be higher than it would otherwise have been, the resulting price is an artificial price, not determined by the free forces of supply and demand. Oehmke's increasing bids during this period were economically irrational, and Kantrowitz must have known it. Kantrowitz also bought heavily at the opening on August 11, 2004, and posted escalating bids on August 13, 2004, knowing that Oehmke wanted only to cause pain for the shorts (Tr. 397-400, 815; DX 93). See Vladlen "Larry" Vindman, 87 SEC Docket 2626, 2639 (Apr. 14, 2006) ("Manipulation violates the antifraud provisions even when it is employed in an attempt to bring the stock price artificially to a level where the manipulator believes it should rightfully be."). On the afternoon of August 13, 2004, Kantrowitz continued to post Oehmke's bids for 100,000 shares of Concorde at escalating prices above $5.65 per share, despite the fact that Oehmke had objected vehemently when he had to purchase 100,000 shares at $5.48 per share that morning (DX 94 at 413-18).

Kantrowitz also engaged in manipulative conduct when he repeatedly collaborated with Hansen at Sunstate. He did so between June 30 and July 26, 2004, by acting in tandem with Hansen to increase the inside bid for Concorde from $0.01 per share to $3.00 per share. He did so again on July 27, 2004, by accommodating Oehmke's desire to have two offers showing up on everybody's Level II screens. Kantrowitz must have known he was creating the false impression that there were two offers when in fact there was only one seller in the market at that time. I infer that Kantrowitz knew the only purpose of Oehmke's request was to generate market interest in Concorde trading. Finally, Kantrowitz collaborated with Hansen on August 13, 2004, when he honored Oehmke's instructions to follow Hansen's increasing bids and maintain a penny spread between the inside bid and inside offer.

These acts involved manipulative conduct because they created the false impression that the bid market for Concorde was more active, competitive, and independent than it was in fact. See Edward J. Mawod & Co., 46 S.E.C. 865, 871 (1977) ("When investors and prospective investors see activity, they are entitled to assume that it is real activity"), aff'd, 591 F.2d 588 (10th Cir. 1979). Kantrowitz may not have known precisely how many shares of Concorde Oehmke controlled away from Newbridge, but he knew that Oehmke controlled a significant number of shares. I conclude that Kantrowitz was well aware of what Oehmke was doing and that he was a willing and active participant in Oehmke's scheme. I infer that Oehmke and Kos outlined the manipulative scheme for Kantrowitz at the June 22, 2004, restaurant meeting. Kantrowitz acted with scienter.

The Division's inability to prove that Oehmke directed Kantrowitz to execute wash trades was surprising, because that charge was specifically alleged in the OIP. Nonetheless, the

absence of proof of wash trades is not fatal to the Division's case. See Swartwood, Hesse, 50 S.E.C. at 1307; Halsey, 30 S.E.C. at 112.

Amico and Goldstein argue that Kantrowitz was too busy making markets in other stocks to appreciate what Oehmke was doing with Concorde. I reject this defense. The record shows that Oehmke was a major customer of Kantrowitz's, that Kantrowitz was willing to spend as much time as necessary with Oehmke, and that, for concentrated periods in July and August 2004, Kantrowitz did little else but trade Concorde for Oehmke (Tr. 789, 801-02, 804-05; DX 94 at 373 ("full time job this stock is")).

Amico and Goldstein also contend that, because no trades were executed between June 30 and July 26, 2004, Kantrowitz's effort to raise the bid price from $0.01 to $3.00 per share during that period "may" not have occurred "in connection with the purchase or sale" of Concorde securities, as required by the antifraud provisions of the federal securities laws. I reject this argument, as well. See SEC v. Zandford, 535 U.S. 813, 820 (2002); Orlando Joseph Jett, 57 S.E.C. 350, 391-95 (2004).

Finally, Amico and Goldstein maintain that stock promotion activity by Kos, Spreadbury, and Hansen may have been the "real" cause of Concorde's increasing price, irrespective of Kantrowitz's trading activities. Because the evidence is overwhelming that Oehmke and Kos were working together in furtherance of the same manipulative scheme, I find no merit to this argument.

I conclude that Kantrowitz willfully violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Section 17(a) of the Securities Act through the trading activity he conducted in Roanoke and Concorde.[50]

III. AMICO AND GOLDSTEIN FAILED TO SUPERVISE KANTROWITZ.

OIP ¶¶ G.43-G.47 allege that Amico and Goldstein were on notice that any delegation of supervisory authority to the chief compliance officer to develop supervisory policies and procedures was unreasonable. As a result, the OIP charges that Amico and Goldstein were responsible for Newbridge's failure to develop policies, procedures, and systems reasonably designed to prevent and detect Kantrowitz's violations of the federal securities laws. The OIP

[50] Kantrowitz is not liable for antifraud violations involving material misrepresentations or omissions in Spreadbury's July 28, 2004, press release (DX 80). First, the OIP did not allege such a theory of liability, and the Division did not argue the matter in its pleadings. Kantrowitz testified that he did not research companies, and Oehmke confirmed that traders generally are not interested in that sort of information (Tr. 70, 665-66). Second, Kantrowitz may not be held liable for any such misrepresentations or omissions on some sort of "scheme liability" theory. Cf. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769-72 (2008). Third, not even SEC v. Tambone, 550 F.3d 106, 127-28, 130-36 (1st Cir. 2008), pet. for rehearing en banc pending, at its broadest, would render Kantrowitz negligently liable for any such misrepresentations or omissions in violation of Section 17(a)(2) of the Securities Act.

also claims that Amico and Goldstein were on notice that any delegation of their supervisory authority over Kantrowitz to the chief compliance officer, the head trader, and the trading compliance officer was ineffective. As a result, the OIP maintains that Amico and Goldstein retained the responsibility for reasonable day-to-day supervision over Kantrowitz.

A. The Applicable Law

To demonstrate deficient supervision by Amico and Goldstein, the Division must prove that: (1) Kantrowitz willfully violated the federal securities laws; (2) Kantrowitz was subject to their supervision; and (3) they failed reasonably to supervise him with a view to preventing or detecting his violations.

The Exchange Act does not make a supervisor a guarantor against violation. "No finding of a breach of the duty to supervise can be made absent a concrete showing that the particular supervisor in question failed to conduct himself as a reasonable supervisor would have done in the circumstances." Frank J. Crimmins, 46 S.E.C. 459, 459 (1976).

"The president of a corporate broker-dealer is responsible for compliance with all of the requirements imposed on his firm unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient." Consol. Inv. Servs., Inc., 52 S.E.C. 582, 590 & n.30 (1996) (collecting cases).

Section 15(b)(6) of the Exchange Act, in conjunction with Section 15(b)(4), provides that the Commission may sanction a supervisor for failure reasonably to supervise a person subject to his supervision, with a view to preventing violations of the federal securities laws or the Commission's implementing rules and regulations. Scienter is not an element of failure to supervise liability under the Exchange Act. See Clarence Z. Wurts, 54 S.E.C. 1121, 1132 (2001).

The relevant part of Section 15(b)(4)(E) of the Exchange Act provides that no person may be deemed to have failed reasonably to supervise any other person if:

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and
(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

Amico and Goldstein contend that so-called "red flags" are essential in a failure to supervise case, and argue that no such "red flags" were apparent to them. This misstates the law. While the presence of "red flags" warning of possible irregularities may often be an aggravating factor in a failure-to-supervise case, the absence of such warning signs is not a defense where the gravamen of the supervisory deficiency is a failure to have reasonable procedures. NationsSecurities, 53 S.E.C. 556, 572 & n.17 (1998).

B. Amico and Goldstein Were Responsible for Newbridge's Failure to Develop Reasonable Policies, Procedures, and Systems to Prevent and Detect Kantrowitz's Violations.

Written supervisory procedures are not adequate if they contain only a list of prohibited activities, but do not specify guidelines for supervisors to detect and prevent such activities (Tr. 2707-08, 2711-12). Richard F. Kresge, 90 SEC Docket 3072, 3089 (June 29, 2007); Gary E. Bryant, 51 S.E.C. 463, 471 (1993); Kochcapital, Inc., 51 S.E.C. 241, 247-48 (1992).

Amico and Goldstein were responsible for ensuring that Newbridge had adequate written supervisory procedures (Tr. 2714-15; DX 123 at 6-7). However, they did not take reasonable steps to do so. Both Respondents acknowledged that, during the relevant period, Newbridge did not have any written supervisory procedures directed toward detecting and preventing market manipulation or improper quoting activity. Newbridge did not have a written supervisory procedure to review instant messages until mid-2004. I disagree with J. Smith's opinion that the firm's 2004 Manuals were acceptable and that the problem was merely one of execution (DX 123 at 8). That may have been true as to instant message review in the 2004 Manual, but not as to the written review procedures for other prohibited practices.

I doubt that Respondents were as detached as they claim from the firm's decision to employ Kantrowitz. However, if Respondents' testimony is accepted as truthful, they were inexcusably uninvolved in Newbridge's decision to hire Kantrowitz and unaware of the fact that he would be subject to strict supervision. Others at Newbridge who might have played a role in enforcing the registration agreement with the State of Florida, including Breitbart, Brown, Bush, and Perich, were equally unaware of the registration agreement or its terms. If Newbridge had implemented reasonable written supervisory procedures for reviewing the background of prospective employees with disciplinary histories before 2002, Amico and Goldstein would have been aware of Kantrowitz's prior discipline. See supra pp. 28-29.

Once the State of Florida required strict supervision of Kantrowitz, there is no evidence that Newbridge had rules and procedures in place to guide Vallejo, who was responsible for such supervision. See James Harvey Thornton, 53 S.E.C. 1210, 1216 (1999), aff'd, 199 F.3d 440 (5th Cir. 1999). The record makes clear that Kantrowitz was never subjected to strict supervision during the twenty-one months the registration agreement was in force. Vallejo did not do anything to supervise Kantrowitz beyond what he normally did to supervise others at the trading desk. He fell behind on reviewing Kantrowitz's trade blotters. Amico and Goldstein both knew it, yet took no effective corrective action. But see Wurts, 54 S.E.C. at 1130 ("Supervisors who know of an employee's past disciplinary history must ensure not only that rules and procedures are in place to supervise the employee properly, but also that those rules and procedures are enforced."); Consol. Inv. Servs., Inc., 52 S.E.C. at 588-89 ("A registered representative who has previously evidenced misconduct can be retained only if he subsequently is subjected to a commensurately higher level of supervision.").

Even if a brokerage firm's written supervisory procedures are adequate, "[t]he presence of procedures alone is not enough. Without sufficient implementation, guidelines and strictures

do not assure compliance." Rita H. Malm, 52 S.E.C. 64, 69 & n.17 (1994). "It is not sufficient for the person with overarching supervisory responsibilities to delegate supervisory responsibility to a subordinate, even a capable one, and then simply wash his hands of the matter until a problem is brought to his attention. . . . Implicit is the additional duty to follow-up and review that delegated authority to ensure that it is being properly exercised." Castle Secs. Corp., 53 S.E.C. 406, 412 & n.19 (1998) (collecting cases).

Amico and Goldstein never conducted the necessary follow-up. The written supervisory procedures Newbridge submitted to the NASD in 2001 represented that the firm's supervisory staff would complete weekly checklists. There were no checklists. See supra note 29. Newbridge developed its stock certificate deposit questionnaire in response to the 2002 deficiency letter from the Commission's staff. However, Newbridge never put in place any effective supervisory review procedures to ensure that registered representatives completed the questionnaires on a timely basis, or to ensure that any compliance officials conducted a meaningful review of the completed questionnaires. By approving many of Kantrowitz's requests for the advance release of funds to his customers, Amico and Goldstein effectively ensured that the questionnaires could not serve their intended purpose.[51]

Amico and Goldstein acknowledge that there was an institutional breakdown at Newbridge so that no written supervisory procedures covered the review of instant messages between July 2003 and mid-2004. However, they do not recognize that it was their failure to designate supervisory responsibility for the review of instant messages that led to this institutional breakdown. Amico's purported verbal follow-up(s) with Vallejo and Perich, if indeed they occurred, see supra note 43, were inadequate to meet his duty independently to verify that his delegation of supervisory authority over instant message review was effective. Even after mid-2004, once Newbridge had a written supervisory procedure governing review of instant messages, the supervisory review actually conducted was considerably more limited than the review protocol described in the firm's 2004 Manuals.

Finally, the Commission's examination staff put Amico on notice, through the 2002 deficiency letter, that Newbridge's written supervisory procedures covering possible manipulative devices in the area of low-priced securities were deficient. Amico and Goldstein assigned Breitbart and Brown to take the lead in revising the firm's compliance manual during 2004. However, neither Breitbart nor Brown had the experience or qualifications to review the trading-related aspects of the revised manual. The weight of the evidence does not show that Vallejo, Perich, or anyone else with a trading background provided any input into the compliance manual review process during 2004.

[51] Respondents stress that there was nothing illegal about their decisions to authorize the early release of funds to Kantrowitz's customers. While that is true, it misses the point. The questionnaires were the principal tool Newbridge developed in response to the staff's criticism that the firm was not monitoring the receipt and delivery of large blocks of low-priced securities. Once the questionnaires were rendered useless, Newbridge had no other supervisory tool to replace them.

C. Amico and Goldstein Knew that Their Delegation of Supervisory Authority over Kantrowitz was Ineffective.

I agree with the Division that Amico and Goldstein did not reasonably and effectively delegate their supervisory responsibility over the firm's trading desk or Kantrowitz. Brown disavowed any ability or responsibility with respect to trading compliance. Vallejo had little understanding of how to detect or prevent market manipulation or other prohibited practices at the trading desk. Moreover, Vallejo was busy with the firm's proprietary trading, which limited the time he could devote to supervising the other traders. The record is also clear that there was widespread confusion among the firm's line supervisors and compliance personnel about the scope of their duties and reporting responsibilities.

Amico and Goldstein emphasize that they knew little about trading issues when Newbridge applied for market making authority in 2001. Division expert J. Smith opined that, "if the owners of a firm decide they want to get into an area of business [with which] they're not particularly well acquainted . . . , they had better get acquainted with it because they're going to have to supervise it" (Tr. 2587). According to J. Smith, even if the persons with ultimate supervisory authority delegate responsibility, they must "check to be sure that [the delegated supervisors] know what they're doing, that they've done what [the persons with ultimate supervisory authority] asked them to do, and that they've done it adequately" (Tr. 2588). I agree with J. Smith and conclude that Amico's and Goldstein's personal lack of trading expertise is not a defense to any of the charges in the OIP.

Amico and Goldstein repeatedly attempt to shift blame for their supervisory failures to the NASD and the Commission. As illustrations, they consider it significant that the NASD knew in 2001 that they did not have Series 55 trading licenses or trading experience, but nevertheless granted Newbridge market making authority. They also observe that the Commission's staff did not tell them that the staff considered Newbridge's response to the 2002 deficiency letter to be inadequate for one year. In these circumstances, Respondents argue that it was reasonable for them to assume that the procedures adopted in response to the 2002 deficiency letter were adequate. However, it is well settled that respondents cannot shift responsibility for compliance to the NASD or the Commission. See William H. Gerhauser, 53 S.E.C. 933, 940 & n.17 (1998) (collecting cases). "A regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation." Id.; see also Steven C. Pruette, 46 S.E.C. 1138, 1141 & n.17 (1978) (collecting cases). Under this precedent, it was unreasonable for Amico and Goldstein to equate NASD or Commission staff "inaction" with tacit approval of Newbridge's procedures.

Amico and Goldstein also defend on the grounds that none of their subordinates ever walked through their "open door" and informed them that Kantrowitz was collaborating with Bojadzijev and Oehmke to manipulate the markets for Roanoke and Concorde. This demonstrates far too narrow an understanding of their ultimate supervisory responsibility. Several Newbridge employees informed Amico and Goldstein that Kantrowitz was engaging or potentially engaging in unlawful conduct and was proving difficult to supervise. In January 2003, Amico and Goldstein knew that Vallejo's "daily" supervisory review of Kantrowitz's trade blotters was ineffective. In February 2003, Amico and Goldstein knew that Brown and

Weissman were concerned that Kantrowitz had sold 1,000 shares of a restricted stock in violation of Securities Act Rule 144. In July 2003, Goldstein knew that Brown was having difficulty obtaining information from Kantrowitz about trades in Blue Moon penny stock. Despite Brown's direct request for help, Goldstein waited ten days before providing token assistance. In August and September 2003, Amico and Goldstein knew that Brown and Perich were having trouble obtaining penny stock disclosure documents and non-solicitation letters from Kantrowitz. In November 2003, Goldstein knew that Kantrowitz was repeatedly selling stock before he had completed the stock certificate deposit questionnaires. Many of these issues arose while Kantrowitz was still subject to the registration agreement with the State of Florida. All of them occurred before Kantrowitz traded Roanoke and Concorde. "Decisive action is necessary whenever supervisors are made aware of suspicious circumstances, particularly those that have an obvious potential for violations." George J. Kolar, 55 S.E.C. 1009, 1016 (2002); Quest Capital Strategies, Inc., 55 S.E.C. 362, 371 (2001) (same); Consol. Inv. Servs., 52 S.E.C. at 588 & n.27 (same) (collecting cases).

Amico and Goldstein cannot claim that they reasonably believed that Newbridge's supervisory systems were working well. Regulators were repeatedly telling them otherwise. See supra pp. 34-37. Nor may Respondents defend on the grounds that each warning from a regulator should be viewed in isolation and given the narrowest possible interpretation.

Amico was repeatedly put on notice that Kantrowitz was violating or potentially violating the federal securities laws. The 2002 deficiency letter from the Commission's staff identified questionable transactions in low-priced securities and expressly pointed to two accounts managed by Kantrowitz. The 2003 deficiency letter from the Commission's staff alerted Amico to the fact that five of Kantrowitz's customers were involved in the distribution of unregistered securities. The Kantrowitz customers identified in the 2002 and 2003 deficiency letters are precisely the same penny stock promoters and consultants for whom Kantrowitz requested and received approval for early release of sales proceeds.[52]

D. Amico and Goldstein Are Equally Responsible for Failing to Supervise Kantrowitz.

Amico and Goldstein both shared ultimate supervisory responsibility for the trading desk and Kantrowitz throughout the relevant period. The firm's organizational charts reflect that, from at least August 2003 until December 2004, the chief compliance officer and head trader reported directly to both of them. Both Respondents were routinely addressed or copied on e-mails and memoranda relating to compliance issues or problems about the trading desk and

[52] DX 131 grants approval to wire funds to Bojadzijev, Michael Muzio (president of Blue Moon), Keel Enterprises and Chiang Ze Capital (two more Kos-Jaynes offshore entities whose accounts were traded by Oehmke), Jeffrey H. Galpern (Galpern), and JHG Enterprises (a Galpern company). DX 131 also approves wires and journal entries for Galpern on January 16 and February 13, 2004. Amico claimed that Newbridge closed Galpern's accounts after the firm received the 2003 deficiency letter (Tr. 1327). After two warnings from the Commission's staff, Newbridge still did not move very quickly to cut its ties with Galpern.

Kantrowitz. Both Respondents were equally involved in reviewing and shaping the firm's compliance policies and procedures, granting exceptions to those policies, hiring compliance officers, and attending compliance meetings.

Amico had a background in developing and implementing trading compliance and supervisory procedures before acquiring Newbridge. He was sometimes more involved than Goldstein in compliance issues relating to the trading desk. For example, he was deeply involved in the application process with the NASD in 2001 to obtain market making capabilities and was listed as the firm's contact person. Amico also responded to the 2002 deficiency letter from the Commission's staff on behalf of Newbridge. When Goldstein was on his NASD-mandated supervisory suspension from December 17, 2003, through January 16, 2004, during one of the critical periods at issue in this proceeding, Amico had sole ultimate supervisory responsibility at Newbridge.

The fact that Newbridge and Vallejo have been held liable for supervisory failures with respect to Kantrowitz does not preclude additional supervisory failure charges against Amico and Goldstein. If supervisory responsibility is shared among firm executives, each individual supervisor may be held liable for supervisory failures. See Robert E. Strong, 92 SEC Docket 2875, 2883-84 & n.21 (Mar. 4, 2008); Steven E. Muth, 86 SEC Docket 1217, 1241-42 & n.67 (Oct. 3, 2005); Steven P. Sanders, 53 S.E.C. 889, 904 & n.30 (1998).

I conclude that Kantrowitz was subject to Respondents' supervision. I also conclude that Amico and Goldstein failed reasonably to supervise Kantrowitz, with a view to preventing and detecting his willful violations of the securities registration provisions of the Securities Act, and the antifraud provisions of the Securities Act and the Exchange Act.

SANCTIONS

The Division urges me to bar Amico and Goldstein from association with any broker or dealer in a supervisory capacity, with a right to reapply after five years. It also seeks civil monetary penalties of $120,000 against both Respondents.

Amico and Goldstein argue that no sanctions are warranted. They contend that it has been several years since the trading activity at the heart of the case, and they maintain that they have caused Newbridge to undertake meaningful remedial measures. These corrective actions include closing Bojadzijev's and Oehmke's accounts, eliminating instant messaging, cutting back on Newbridge's penny stock business, hiring an outside consultant, and causing Kantrowitz to resign. Amico and Goldstein do not argue that one of them should receive lighter sanctions than the other. I consider the opportunity to make this argument as waived.

The Division points to a pattern of ongoing violations at Newbridge as an aggravating factor. It argues that Amico and Goldstein have repeatedly assured regulators that Newbridge would take corrective action, but never followed through to ensure that the corrective action was effective. In addition to the five episodes discussed above, see supra pp. 34-37, the Division identifies six other disciplinary actions as evidence that Amico and Goldstein have proven incapable of supervising a brokerage firm with a clean compliance record:

- On March 10, 2005, the NASD censured and fined Newbridge $57,500 for, among other things, trade reporting violations and supervisory deficiencies, based on a review of trading on April 23-24, 2003 (DX 5).

- On January 26, 2006, the NASD censured and fined Newbridge $35,000 for limit order display, order audit trail system, and trade reporting violations, based on a review of various periods from October 2002 through June 2004 (DX 6).

- On April 10, 2007, the NASD censured and fined Newbridge $70,000 for best execution, trade reporting, short sale, and recordkeeping violations, based on a review of transactions during the period July 1 through September 30, 2004, and August 4-5, 2005 (DX 7).

- On January 25, 2008, FINRA fined Newbridge $5,000 for engaging in corporate bond transactions with customers and failing to conduct such transactions at a fair price for the periods April 1 through June 30, 2004, and July 1, 2004, through March 31, 2005 (DX 8).

- On March 14, 2008, FINRA fined Newbridge $177,500 and ordered the firm to pay more than $61,000 in restitution to customers for, among other things, charging excessive markups and markdowns, failing to develop and implement a written anti-money laundering program, and for supervisory deficiencies, based on a review of various months from April 1, 2002, through August 15, 2003 (DX 9). Brown and Vallejo were each fined $10,000 (as part of the $177,500) for their supervisory failures and suspended for fifteen days (DX 9).

- On October 21, 2008, FINRA censured and fined Newbridge $27,500, and ordered the firm to pay restitution to customers of $17,345, based on a review of trades on August 15-16, 2006 (DX 10).

I agree with the Division that a pattern of misconduct like this creates a significant risk for the investing public. When Newbridge, under the supervision of Amico and Goldstein, has taken corrective action, it has done so slowly and only in response to prodding from regulators. This is plainly an aggravating factor, even though Amico and Goldstein were not named as respondents in these six disciplinary actions, and even though the matters were settled without admitting or denying liability.

Amico and Goldstein argue that the sanctions imposed against supervisory officials in prior settled cases have been milder than the sanctions sought against them and that the sanctions imposed against settling supervisors Newbridge and Vallejo in this proceeding are also milder than the sanctions sought against them. However, it is well established that respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received based on pragmatic considerations such as the avoidance of time-and-manpower consuming adversary proceedings. Leslie A. Arouh, 57 S.E.C. 1099, 1123 & n.56 (2004); Stonegate Sec., Inc., 55 S.E.C. 346, 355 & n.21 (2001).

Amico and Goldstein contend that the misconduct alleged in the OIP was confined to one employee involved in a small part of Newbridge's business over a limited period of time. They also assert that the OIP identified no manipulative transactions occurring outside the period from November 2003 to August 2004. Both claims are literally true, but highly misleading. The Division offered several exhibits to demonstrate that misconduct at Newbridge has continued until the present. The suggestion that Kantrowitz was the only market manipulator at Newbridge ignores Arthur Redler (Redler), another Newbridge trader (Tr. 979). Cf. Arthur S. Redler, Exchange Act Release No. 59649, 2009 SEC LEXIS 995 (Mar. 30, 2009) (settled proceeding) (barring Redler from associating with any broker or dealer and from participating in any penny stock offering, based on his guilty plea to criminal charges of securities fraud for manipulating a penny stock between October 2004 and November 2005).[53]

A. Supervisory Bars

Sections 15(b)(4)(E) and 15(b)(6)(A)(i) of the Exchange Act authorize the Commission to censure, place limitations on, suspend, or bar a person associated with a broker or dealer if it finds that such person failed reasonably to supervise, with a view to preventing violations of the federal securities laws and rules and regulations thereunder, another person who commits such violations, if the other person is subject to the person's supervision. The Commission must also find that such a censure, placing of limitations, suspension, or bar is in the public interest.

In determining the public interest, the Commission considers the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. See Carley, 92 SEC Docket at 1730, 1732 (imposing a permanent supervisory bar); Stephen J. Horning, 92 SEC Docket 207, 224-25 (Dec. 3, 2007) (imposing a permanent supervisory bar), pet. for review pending, D.C. Cir., No. 08-1038; Muth, 86 SEC Docket at 1250 (imposing a supervisory bar with the right to reapply after one year). The Commission's inquiry into the appropriate sanction to protect the public interest is flexible, and no one factor is dispositive. David Henry Disraeli, 92 SEC Docket 852, 875 & n.85 (Dec. 21, 2007).

Kantrowitz's underlying violations were egregious, as were Respondents' failures to supervise him. Kantrowitz's violations were not isolated, and Respondents' supervisory failures that allowed them to occur were evident before 2003 and have continued well after 2004. Kantrowitz's underlying violations involved a high degree of scienter, and Respondents' failure to supervise involved repeated instances of negligent conduct.[54] Respondents offer assurances

[53] I have not considered Redler's criminal conduct as evidence of Amico's and Goldstein's failure to supervise. I cite Redler to refute the implication that Newbridge employed only one rogue trader whose misconduct was confined to a small window of time in the distant past.

[54] In recent cases involving Sections 15(b)(4)(E) and 15(b)(6) of the Exchange Act, the Commission has gone beyond the statutory requirement of finding negligent supervision, and has instead characterized certain deficient supervision as reckless. See, e.g., Horning, 92 SEC

against future supervisory lapses, but their assurances are not credible, given the number of times they have made similar, hollow promises in the past. Consistent with their vigorous defense, Respondents do not acknowledge the wrongful nature of their supervisory conduct. In the absence of supervisory bars, it is highly likely that future supervisory failures will occur.

Respondents' conduct demonstrates a fundamental lack of comprehension regarding what constitutes reasonable supervision. I conclude that supervisory bars are warranted by the facts and circumstances and are necessary to protect the investing public from dealing with securities professionals who are not adequately supervised. However, the Division's request to preclude applications for reinstatement sooner than five years involves overreaching, particularly in light of the fact that Newbridge will continue in business. Respondents may seek reinstatement after two years from the date the supervisory bars take effect.

The Division has never explained how it expects the supervisory bars to work in practical terms. Amico and Goldstein both hold Series 7 licenses and, together, they control Newbridge by ownership of 54% of its stock. When the supervisory bars take effect, Amico and Goldstein may continue to work at Newbridge as non-supervisory registered representatives or in other areas of the Newbridge financial empire that do not require registration as a broker-dealer supervisor.[55] The difficulty arises from the fact that the supervisory bars may require the installation of a "figurehead" manager for Newbridge's broker-dealer business and that

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Docket at 225-26 (holding that Horning "acted recklessly by failing to implement basic supervisory procedures when confronted with previous misconduct"); cf. Wurts, 54 S.E.C. at 1132 (characterizing Wurts's lapses of judgment as "extraordinary, almost to the point of recklessness"). Neither the Commission nor the reviewing courts have held that negligent supervision can support only token sanctions. To the contrary, the Commission has imposed meaningful sanctions on deficient supervisors without characterizing the supervision as reckless. See Thornton, 53 S.E.C. at 1217; Consol. Inv. Servs., 52 S.E.C. at 590-91.

The OIP alleges that Kantrowitz was reckless. It does not allege that Amico and Goldstein were reckless supervisors. Moreover, the Settlement Orders already issued in this proceeding do not characterize either Newbridge or Vallejo as reckless supervisors. I seriously doubt that the Division "pulled its punches"—i.e., downgraded what it believed to be reckless supervisory conduct to negligent supervisory conduct—merely to induce Newbridge and Vallejo to settle. These considerations counsel against a determination that Amico and Goldstein were reckless supervisors. In any event, given the Commission's view that no one of the relevant factors, by itself, is dispositive, see Disraeli, 92 SEC Docket at 875 & n.85, then it should not be necessary to exceed the statutory requirement of negligence to justify a supervisory bar.

[55] There are no collateral bars in litigated enforcement proceedings. See Teicher v. SEC, 177 F.3d 1016, 1019-22 (D.C. Cir. 1999). As a result, when the Commission orders a supervisory suspension or a supervisory bar under the Exchange Act, the employing firm can soften the sting of that sanction by finding a new supervisory home for the suspended or barred individual in its investment adviser arm. Newbridge Financial Services Group, Inc., is registered with the Commission as an investment adviser. I have kept this prospect in mind when evaluating Respondents' claim that the Division's proposed sanctions are "draconian."

Respondents may still wish to flex their muscles as controlling stockholders. It is hard to understand how the Division believes this could be in the public interest, when the Commission has previously criticized such arrangements. See Victor Teicher, 91 SEC Docket 3068, 3071 (Nov. 5, 2007); Kirk A. Knapp, 50 S.E.C. 858, 862-63 (1992) ("a difficult supervisory situation"). Moreover, as the Division is well aware, inattention to the particulars of such temporary "figurehead" arrangements may lead to mischief and more litigation. Cf. SEC v. Yu, 231 F. Supp. 2d 16, 19-22 (D.D.C. 2002) (granting a preliminary injunction where the president of a brokerage firm continued to supervise despite a supervisory bar). However, such unintended consequences are for the Division to address in the first instance. Cf. Delta Equity Servs. Corp., 76 SEC Docket 2841, 2850-51 (Feb. 21, 2002) (settled proceeding) (allowing the Division to approve the temporary supervisory structure).

Amico and Goldstein assert that suspending or barring both of them from acting in a supervisory capacity for any length of time would unnecessarily weaken Newbridge's management and operations. This argument finds support in the Commission's jurisprudence. Cf. Wurts, 54 S.E.C. at 1133 ("[B]ecause [the president and sole owner] is so closely involved with [the registered broker-dealer], suspending [him] or barring him from a supervisory or proprietary role for a lengthy period could cause the closing of [the firm], with serious consequences for its employees and customers."). However, Respondents have not developed the record on this issue, and they may not attempt to use the theoretical prospect of harm to their employees and customers as bargaining chips to save themselves. Two of the five Newbridge employees who testified are sanctioned supervisors. Perhaps Newbridge's customers are primarily widows and orphans, but the customers who appeared at the hearing were market manipulators and convicted criminals. The present case is easily distinguished from Wurts on that basis. I have considered the possibility that Amico, Goldstein, and Newbridge might benefit from the type of courtesies the Department of Justice extended to Andrew and Lea Fastow during the Enron Corporation criminal case.[56] However, nothing that Respondents presented at the hearing warrants such relief in this Initial Decision.

B. Civil Monetary Penalties

Under Section 21B(a)(4) of the Exchange Act, the Commission may assess a civil penalty if a respondent has failed reasonably to supervise another person who has willfully violated the Securities Act, the Exchange Act, or the rules or regulations thereunder.

Section 21B(b) of the Exchange Act specifies a three-tier system identifying the maximum amount of a civil penalty. For each "act or omission" by a natural person, the adjusted maximum amount of a penalty in the first tier is $6,500; in the second tier, it is $60,000; in the third tier, it is $120,000.[57] For a second-tier penalty, the act or omission must have "involved

[56] "Plea Deal for Kids in Enron Case Draws Fire," DENVER POST, Jan. 22, 2004, at F-1 ("As part of a carefully orchestrated deal, the government agreed that the couple's sentences will be timed so their young sons would not be without a parent while the other does time.").

[57] As required by the Debt Collection Improvement Act of 1996, the Commission has periodically increased the maximum penalty amounts for violations. See 17 C.F.R. §§ 201.1001,

fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." A third-tier penalty not only must meet the requirements for a second-tier penalty, but the act or omission also must have "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission."

The Commission also must find that a monetary penalty is in the public interest. Six factors are relevant to the public interest determination: (1) fraud, deceit, manipulation, or the deliberate or reckless disregard of a regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other factors as justice may require. See Section 21B(c) of the Exchange Act. In its discretion, the Commission may consider evidence of a respondent's ability to pay. See Section 21B(d) of the Exchange Act.

The Division treats the entire course of conduct in the OIP as a single act or omission and not as a series of acts and omissions as to which multiple penalties would be appropriate. Amico and Goldstein do not argue that they lack the ability to pay the maximum $120,000 penalties the Division seeks (Order of Nov. 20, 2008). The proceeding was litigated on that basis, and it is too late for either side to shift theories now.

The Division has not quantified the harm to others and it has not shown that Amico and Goldstein were unjustly enriched. Goldstein has a prior disciplinary record, but Amico does not.

To determine the tier of civil monetary penalty that is appropriate against a deficient supervisor, the Commission first looks at the act or omission of the supervised person. Supervisory failures "involve fraud" where they allow and are responsible in part for the success and duration of fraudulent misconduct by the person supervised. See Kolar, 55 S.E.C. at 1022 (imposing a tier-two penalty against a supervisor); Consol. Inv. Servs., 52 S.E.C. at 590 (same). Kantrowitz's underlying misconduct involved both manipulation and reckless disregard of Exchange Act Rule 10b-5. At a minimum, tier-two penalties are appropriate on that basis against Amico and Goldstein.

The Division did not demonstrate that Kantrowitz's acts and omissions resulted in substantial losses to other persons. Nor did it show that Kantrowitz's acts and omissions created a significant risk of substantial losses to other persons.[58] However, the Division did establish

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.1002, .1003, .1004. Because Kantrowitz's underlying misconduct occurred between November 2003 and August 2004, the adjusted maximum penalty amounts in 17 C.F.R. § 201.1002 govern here.

[58] In Rockies Fund, Inc. v. SEC, 428 F.3d 1088, 1099 (D.C. Cir. 2005), the court of appeals deemed the Commission's explanation for third-tier civil penalties to be insufficient. It vacated the penalties and remanded the proceeding to the agency for further consideration. On remand, the Commission imposed tier-two penalties, instead of tier-three penalties. See Rockies Fund, Inc., 89 SEC Docket 1517, 1528-29 (Dec. 7, 2006) (Remand Opinion), recons. denied, 91 SEC Docket 1418 (Aug. 31, 2007).

that Kantrowitz's acts and omissions "resulted in substantial pecuniary gains" to Kantrowitz. The Division estimated that the gross amount of commission income accruing to Kantrowitz as a result of trading Roanoke and Concorde was $258,389 (Div. Prehear. Br. at 50; DX 129, second page, 50% payout).[59] I conclude that Kantrowitz's pecuniary gains were $258,389.[60] I further conclude that gains of this magnitude are "substantial." Third-tier penalties against Amico and Goldstein are statutorily permissible on that basis.[61]

The Remand Opinion stated that some misconduct "by its nature" creates "a significant risk of substantial loss," even where no actual losses have been proven. See 89 SEC Docket at 1528 n.43. Upon further judicial review, the court of appeals affirmed the tier-two penalties, but it treated the language in note 43 of the Remand Opinion as dictum. See Rockies Fund, Inc. v. SEC, 298 Fed. Appx. 4, *5 (D.C. Cir. Oct. 21, 2008) ("Because the Commission imposed second-tier rather than third-tier penalties, it did not need to explain how the violations 'created a significant risk of substantial losses.'").

In this proceeding, the Division has not argued that Kantrowitz's misconduct "by its nature" created a significant risk of substantial loss. The Division has waived the opportunity to make this argument.

[59] I place considerably more weight on DX 129, the Division's summary exhibit, than I do on Kantrowitz's off-the-cuff estimates at the hearing (Tr. 216-17, 315).

[60] A calculation of pecuniary gain may include prejudgment interest. See SEC v. Koenig, 557 F.3d 736, 744-45 (7th Cir. 2009). Here, however, the Division did not argue that Kantrowitz's commission income of $258,389 should be increased by a specific amount of prejudgment interest to determine his total pecuniary gain as a predicate for Amico's and Goldstein's civil penalties. It has waived the opportunity to make this argument.

[61] Kantrowitz protested that the Division's estimate was too high. He also submitted a sworn financial statement in support of an inability-to-pay defense (Prehear. Conference of Dec. 3, 2008, at 18-21). However, Kantrowitz never adjudicated these issues and ultimately settled. The Commission's Settlement Order required Kantrowitz to disgorge $217,000, plus prejudgment interest of $3,996, a total of $220,996. There is no way to tell from the Settlement Order if the Division's estimate was too high, if the final disgorgement figure was reduced in view of Kantrowitz's financial circumstances, or both. For these reasons, Amico and Goldstein may not benefit from the fact that Kantrowitz negotiated a lesser amount of disgorgement through settlement.

Once the Division showed that its disgorgement figure of $258,389 reasonably approximated the amount of unjust enrichment to Kantrowitz, the burden of going forward shifted to Amico and Goldstein to demonstrate clearly that the Division's disgorgement figure was not a reasonable approximation. See SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995). Amico and Goldstein did not attempt to show that Kantrowitz's pecuniary gains were less than $258,389.

The need for deterrence is not fully satisfied by the supervisory bars. The Commission has imposed or sustained both supervisory bars and substantial civil penalties/fines in prior cases.[62] See, e.g., Carley, 92 SEC Docket at 1732, 1740; Robert J. Prager, 85 SEC Docket 3413, 3436-38 (July 6, 2005); Quest, 55 S.E.C. at 380-81; Consol. Inv. Servs., 52 S.E.C. at 590-91. Substantial civil penalties will help to deter future supervisory lapses by others with ultimate supervisory authority.

The parties did not identify any contested cases in which the Commission has penalized deficient supervisors in amounts that exceed the primary wrongdoer's pecuniary gains. This is a factor that justice requires me to consider. In separate settlement orders, the Commission has already imposed civil penalties against Newbridge ($80,000) and Vallejo ($20,000) for failing to supervise Kantrowitz. Accordingly, I impose civil penalties of $79,000 each against Amico and Goldstein. Collectively, these four supervisory civil penalties equal $258,000, an amount nearly equal to Kantrowitz's substantial pecuniary gains. Civil penalties in a higher amount are not consistent with the public interest.

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on March 20, 2009.

ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED THAT, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Guy S. Amico and Scott H. Goldstein shall each be barred from associating with any broker or dealer in a supervisory capacity. Respondents may file petitions for reinstatement after two years from the effective date of the supervisory bars; and

IT IS FURTHER ORDERED THAT, pursuant to Section 21B of the Securities Exchange Act of 1934, Guy S. Amico and Scott H. Goldstein shall each pay a civil monetary penalty of $79,000.

Payment of the civil penalties shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by wire transfer, certified check, United States Postal money order, bank cashier's check, or bank money order, payable to the Securities and Exchange Commission. The payments, and a cover letter identifying the Respondents and the proceeding designation, shall be delivered to the Comptroller, Securities and Exchange

[62] In Thomas C. Bridge, 92 SEC Docket 3374, 3413 (Mar. 10, 2008) (Initial Decision), an Administrative Law Judge imposed permanent supervisory bars, as well as third-tier penalties. The supervisors petitioned for review, and the Commission heard oral argument on May 13, 2009. As of this date, the Bridge proceeding is still pending before the Commission.

Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter and the instruments of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision pursuant to Rule 111 of the Commission's Rules of Practice. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact, or unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

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James T. Kelly
Administrative Law Judge